CUSTOMS BULLETIN AND DECISIONS

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U.S. Customs Service

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and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 15, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A CERTAIN PRODUCT KNOWN AS VESTOPLAST C 9020

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke New York Ruling Letter (NYRL) A86113, dated September 3, 1996, concerning the classification of a product known as Vestoplast C 9020.

DATE: Comments must be received on or before December 1, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Commercial Rulings Division, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may be inspected at the Office of Regulations and Rulings.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch, Office of Regulations and Rulings (202) 927–1109.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a product known as Vestoplast C 9020. NYRL A86113 dated September 3, 1996, held that the product was classified as propylene copolymers, in subheading 3902.30.0000, Harmonized Tariff Schedule of the United States (HTSUS) (1996). Customs intends to revoke NYRL A86113, dated September 3, 1996, Attachment A to this document, to reflect the proper classification in subheading 3506.91.00, HTSUS, as other prepared adhesives based on rubber or plastics (including artificial resins).

Before taking this action, consideration will be given to any written comments timely received. Proposed HRL 960256, revoking NYRL A86113 and classifying the product in subheading 3506.91.0000, HTSUS, is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October 9, 1997.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 3, 1996.

CLA–2–39:RR:NC:FC:238 A86113
Category: Classification
Tariff No. 3902.30.0000

MR. VERNON KURZ
BDP INTERNATIONAL INC.
1017 4th Avenue
Lester, PA 19029–1813

Re: The tariff classification of VESTOPLAST C 9020, in granular form, from Germany.

DEAR MR. KURZ:

In your letter dated April 24, 1996, resubmitted July 22, 1996 on behalf of your client, Huls America, Inc., you requested a tariff classification ruling.

According to a report issued to this office by the U.S. Customs laboratory in New York, the submitted sample, Vestoplast C 9020, consists of granules composed of an amorphous thermoplastic propylene copolymer, with propylene being the predominant comonomer by weight.

The applicable subheading for the subject product will be 3902.30.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Polymers of propylene or of other olefins, in primary forms: Propylene copolymers." The rate of duty will be 1.3 cents per kilogram plus 7.2 percent.

This merchandise may be subject to the regulations of the Toxic Substances Control Act (TSCA), which is administered by the Environmental Protection Agency. You may contact them at 402 M Street, S.W., Washington, D.C. 20460, telephone number (202) 554–1404, or EPA Region II at (908) 321–6669.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Cornelius Reilly at 212–466–5770.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 960256K
Category: Classification
Tariff No. 3506.91.0000

MR. VERNON KURZ
BDP INTERNATIONAL INC.
1017 4th Avenue
Lester, PA 19029–1813

Re: Tariff Classification of Vestoplast C 9020; Revocation of New York Ruling Letter (NYRL) A86113, Dated September 3, 1996.

DEAR SIR:

In response to your letter dated April 24, 1996, on behalf of Huls America, Inc., the Customs Service issued NYRL A86113, dated September 3, 1996, which held that the product

known as Vestoplast C 9020, was classified in subheading 3902.30.0000, Harmonized Tariff Schedule of the United States (HTSUS), as polymers of propylene or other olefins, in primary forms: propylene copolymers, with a 1996 general rate of duty at 1.3 cents per kg., plus 7.2 percent *ad valorem*. You submitted additional information in your letter of September 17, 1996, to support your position that the product was classified in subheading 3506.91.0000, HTSUS, as prepared glues and other prepared adhesives, not elsewhere specified or included * * * Other: Adhesives based on rubber or plastics (including artificial resins), with a 1996 general rate of duty at 2.1 percent *ad valorem*. You requested reconsideration of NYRL A86113. This letter is to advise you that NYRL A86113 no longer reflects the views of the Customs Service. The following represents our position.

Facts:

Based upon the original information, a Customs Laboratory report concluded that Vestoplast C 9020 was an amorphous thermoplastic propylene copolymer with propylene being the predominant comonomer by weight, in primary form, resulting in the classification of the product in subheading 3902.30.0000, HTSUS. Additional information indicates that the product also contains an aliphatic hydrocarbon resin, and a polyethylene wax which makes the product tacky, and used as an adhesive. The Customs laboratory confirmed that the product contained wax as claimed.

Issue:

The issue is whether the product described above with the addition of wax, is classified as an adhesive.

Law and Analysis:

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and General Rules of Interpretation of the HTSUS. The EN for Heading 3506, states, in part, that the heading covers

> (B) Prepared glues and other prepared adhesives, not covered by a more specific heading in the Nomenclature, for example:
>
> (4) Preparations specially formulated for use as adhesives, consisting of polymers or blends thereof of headings 39.01 to 39.13 which, apart from any permitted additions to the products of Chapter 39 (fillers, plasticisers, solvents, pigments, etc.), contain other added substances not falling in that Chapter (e.g., waxes).

The product, as described, contains the components listed in the EN which indicates that it is classified in heading 3506.

Holding:

The product, Vestoplast C 9020, as described above, is classified as other prepared adhesives based on rubber or plastics (including artificial resins), in subheading 3506.91.0000, HTSUS.

NYRL A86113, dated September 3, 1996, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF AUDIO/VIDEO LOADING AND DUPLICATING SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of the Tapematic 3003 Audio/Video Loading and Duplicating System. Customs invites comments on the correctness of the proposed modification.

DATE: Comments must be received on or before December 1, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may be inspected at the same office.

FOR FURTHER INFORMATION CONTACT: David W. Spence, Attorney-Advisor, Commercial Rulings Division, (202) 927–2337.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of the Tapematic 3003 Audio/Video Loading and Duplicating System. Customs invites comments on the correctness of the proposed modification.

In NY 818732, issued on February 3, 1996, Customs ruled that the Tapematic 3003 Audio/Video Loading and Duplicating System was classifiable under subheading 8521.10.60, Harmonized Tariff Schedule of the United States (HTSU S), as an other magnetic-type video recording or reproducing apparatus, whether or not incorporating a video tuner. NY 818732 is set forth in "Attachment A" to this document.

It is now Customs understanding that the merchandise is incapable of recording or reproducing a video signal. Therefore, the Tapematic 3003 Audio/Video Loading and Duplicating System is precluded from classification under subheading 8521.10.60, HTSUS, and is classifiable

under subheading 8479.89.97, HTSUS, as an other machine or mechanical appliance having individual functions, not specified or included elsewhere in chapter 84, HTSUS.

Customs intends to modify NY 818732 to reflect the proper classification of the Tapematic 3003 Audio/Video Loading and Duplicating System under subheading 8479.89.97, HTSUS. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters ruling 960943 modifying NY 818732 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October 10, 1997.

MARVIN AMERINICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY.

CLA–2–85:R:N1:108 818732
Category: Classification
Tariff No. 8521.10.6000, 8479.89.9598
and 9031.80.0080

MR. ROBERT MUNDIE
FRITZ COMPANIES, INC.
550–1 Eccles Avenue
PO. Box 280367
San Francisco, CA 94128

Re: The tariff classification of various audio/video loading machines from Italy.

DEAR MR. MUNDIE:

In your letter dated January 1, 1996, you requested a classification ruling. The items at issue are the following machines:

1) tapematic 3003 audio/video loading and duplicating system.
2) audio loader 2002.
3) static audio master (SAM).
4) spectrum analyzer-model ST31.
5) tapematic slave-model 5128 and 5256.
6) switching system-model 5050.

The applicable subheading for the tapematic 3003, static audio master (SAM) and the tapematic slave, will be 8521.10.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for other magnetic tape-type video recording or reproducing apparatus, whether or not incorporating a video tuner. The rate of duty will be 2.3 percent *ad valorem*.

The applicable subheading for the audio loader 2002, will be 8479.89.9598, Harmonized Tariff Schedule of the United States (HTS), which provides for other machinery and me-

chanical appliances having individual functions, not specified or included in this chapter * * * other. The rate of duty will be 3.2 percent *ad valorem*.

The applicable subheading for the spectrum analyzer, model ST31, will be 9031.80.0080, Harmonized Tariff Schedule of the United States (HTS), which provides for other measuring and checking instruments, appliances and machines, not specified or included in this chapter * * * other. The rate of duty will be 3.6 percent *ad valorem*.

Based on the literature you have submitted, this office will require additional information on the switching system in detail as to what it does and how it operates prior to issuing a ruling classification on this item.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact the office of the National Import Specialist at 212–466–5672.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 960943 DWS
Category: Classification
Tariff No. 8479.89.97

MR. ROBERT MUNDIE
FRITZ COMPANIES, INC.
P.O. Box 280367
San Francisco, CA 94128

Re: Reconsideration of NY 818732; Tapematic 3003 Audio/Video Loading and Duplicating System; 8521.10.60.

DEAR MR. MUNDIE:

This is in reference to NY 818732, issued to you on February 3, 1996, concerning the classification of various audio/video loading machines under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed this ruling and determined that the classification of the Tapematic 3003 Audio/Video Loading and Duplicating System must be modified.

Facts:

The Tapematic 3003 Audio/Video Loading and Duplicating System (Tapematic) is a machine the principal function of which is to unwind blank or pre-recorded video tape from a large reel (pancake), and automatically thread and rewind the tape onto a hub in a videotape cassette, thus completing the assembly of the videotape cassette. The Tapematic is incapable of recording or reproducing a video signal.

Issue:

Whether the Tapematic is classifiable under subheading 8479.89.97, HTSUS, as an other machine or mechanical appliance having individual functions, not specified or included elsewhere in chapter 84, HTSUS, or under subheading 8521.10.60, HTSUS, as an other magnetic-type video recording or reproducing apparatus, whether or not incorporating a video tuner.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

The HTSUS provisions under consideration are as follows:

8479.89.97: [m]achines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: [o]ther machines and mechanical appliances: [o]ther: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 3 percent *ad valorem*.

8521.10.60: [v]ideo recording or reproducing apparatus, whether or not incorporating a video tuner: [m]agnetic tape-type: [c]olor, cartridge or cassette type: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 1.6 percent *ad valorem*.

In NY 818732, Customs held that the Tapematic was classifiable under subheading 8521.10.60, HTSUS. However, as stated above, it is our understanding that the Tapematic is incapable of recording or reproducing a video signal. Therefore, by the terms of subheading 8521.10.60, HTSUS, the Tapematic is precluded from classification therein.

Also in NY 818732, the Audio Loader 2002, which functions similarly to the Tapematic except using audio tape, was held to be classifiable under subheading 8479.89.95, HTSUS (the precursor to subheading 8479.89.97, HTSUS). Therefore, as the Tapematic is not specified elsewhere in chapter 84, HTSUS, we find that it is classifiable under subheading 8479.89.97, HTSUS.

Holding:

The Tapematic 3003 Audio/Video Loading and Duplicating System is classifiable under subheading 8479.89.97, HTSUS, as an other machine or mechanical appliance having individual functions, not specified or included elsewhere in chapter 84, HTSUS.

Effect on Other Rulings:

NY 818732 is modified to reflect the reasoning stated herein.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF TRIO BARRETTES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of three barrettes (Trio Barrettes). Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before December 1, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may be inspected at the same office.

FOR FURTHER INFORMATION CONTACT: David W. Spence, Attorney-Advisor, Commercial Rulings Division, (202) 927–2337.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of Trio Barrettes. Customs invites comments on the correctness of the proposed revocation.

In NY 815120, issued on October 25, 1995, Customs ruled that the Trio Barrettes, which consists of three barrettes attached to a plastic card on which they are sold as a unit, did not constitute a set and the three barrettes were separately classifiable under subheading 9615.11.40, HTSUS, as other combs, hair-slides and the like, of hard rubber or plastics and not set with imitation pearls or imitation gemstones, and under subheading 9615.11.50, HTSUS, as other combs, hair-slides and the like, of hard rubber or plastics. NY 815120 is set forth in "Attachment A" to this document.

It is now Customs position that the Trio Barrettes constitutes a set as defined in GRI 3(b), HTSUS, and is classifiable under subheading 9615.11.50, HTSUS.

Customs intends to revoke NY 815120 to reflect the proper classification of the Trio Barrettes as a set under subheading 9615.11.50, HTSUS. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters ruling 959187 revoking NY 815120 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October 15, 1997.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 25, 1995.

CLA–2–96:R:N5:353 815120
Category: Classification
Tariff No. 9615.11.4000 and 9615.11.5000

MR. ABE M. KNIPPER
ABE M. KNIPPER CUSTOMS BROKER
80 Sheridan Boulevard
Inwood, NY 11096

Re: The tariff classification of a trio of barrettes from Taiwan or China.

DEAR MR. KNIPPER:

In your letter dated September 21, 1995, received in our office on September 25, 1995, you requested a tariff classification ruling on behalf of your client Edward Jay Accessories, Inc. Samples were submitted for review with your request and will be returned per your request.

The submitted sample, Style **#BA3305X,** consists of three barrettes which are imported attached to a plastic card on which they will be sold as a unit. The plastic card is marked "Trio Barrettes".

Barrette A, the top barrette, consists of simulated pearls with gold colored beads intermittently set in between. They are attached to a metal barrette clip by plastic strands which run through holes in the center of the beads and simulated pearls which then wind around the barrette clip.

Barrette B, the middle barrette, consists of three simulated faceted plastic gemstones each mounted in circular decorated setting which are glued to a metal barrette clip.

Barrette C, the bottom barrette, consists of three circular plastic medallions with inlaid designs which are glued to a metal barrette clip.

The trio of barrettes is not considered as "goods put up in sets for retail sale" because it does not consist of at least two different articles which are prima facie, classifiable in different headings. Each of the barrettes must be classified separately.

The applicable subheading for barrettes A and B will be 9615.11.5000, Harmonized Tariff Schedule of the United States (HTS), which provides for "Combs, hair-slides and the like; * * * of hard rubber or plastic: Other: Other". The rate of duty will be 8.8 percent *ad valorem*.

The applicable subheading for barrette C will be 9615.11.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for "Combs, hair-slides and the like: * * * of hard rubber or plastic: Other: Not set with imitation pearls or imitation gemstones." The rate of duty will be 5.3 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212–466–5881.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 959187 DWS
Category: Classification
Tariff No. 9615.11.50

MR. ABE M. KNIPPER
ABE M. KNIPPER CUSTOMS BROKER
80 Sheridan Boulevard
Inwood, NY 11096

Re: Reconsideration of NY 815120; Trio Barrettes; Sets; GRIs 3(b) and (c); Explanatory Note 3(b)(VIII) and (X); HQ 088774; 9615.11.40.

DEAR MR. KNIPPER:

This is in reference to NY 815120, issued to you on October 25, 1995, concerning the classification of Trio Barrettes under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed this ruling and determined that the classification of the Trio Barrettes must be reconsidered.

Facts:

The merchandise consists of Trio Barrettes (Style #BA33OX), which is comprised of three barrettes attached to a plastic card on which they are sold as a unit. Barrette A consists of simulated pearls With gold colored beads intermittently set in between the pearls. The pearls and beads are attached to a metal barrette clip by plastic strands which run through holes in the center of the beads and pearls and wind around the barrette clip. Barrette B consists of three simulated and faceted plastic gemstones each of which are mounted in a circular decorated setting and glued to a metal barrette clip. Barrette C consists of three circular plastic medallions with inlaid designs glued to a metal barrette clip.

Issue:

Whether the Trio Barrettes constitutes a set as defined in GRI 3(b).

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

The HTSUS provisions under consideration are as follows:

9615.11.40: [c]ombs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: [c]ombs, hair-slides and the like: [o]f hard rubber or plastics: [o]ther: [n]ot set with imitation pearls or imitation gemstones.

The general, column one rate of duty for goods classifiable under this provision is 5.3 percent *ad valorem*.

9615.11.50: [c]ombs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: [c]ombs, hair-slides and the like: (o]f hard rubber or plastics: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 4.4 percent *ad valorem*.

NY 815120 determined that the Trio Barrettes did not constitute a set as defined in GRI 3(b), and held Barrettes A and B to be classifiable under subheading 9615.11.50, HTSUS, and Barrette C to be classifiable under subheading 9615.11.40, HTSUS.

GRI 3(b) states that:

> [m]ixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes, although

not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). Explanatory Note 3(b)(X) (p. 5) states that:

> [f]or the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:
>
> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

The barrettes meet both requirements (b) and (c) above in that they are put up together to meet the particular need of hair care, and it is our understanding that they are put up in a manner suitable for sale directly to users without repacking. We must now ascertain whether the barrettes meet requirement (a).

GRI 6 states that:

> [f]or legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes apply, unless the context otherwise requires.

In HQ 088774, dated March 13, 1991, which dealt with the classification of headband and ponytail ensembles containing items which were all classifiable under the subheading provisions of heading 9615, HTSUS, we stated that:

> [w]ith respect to the instant merchandise, at the heading level, we do not have "goods put up in sets for retail sale" since the headbands and ponytail holders are both classifiable in heading 9615, HTSUS. However, since the instant goods are classifiable under two different subheadings within the same heading, 9615.11 and 9615.19 respectively, and they contain articles put up together to meet a particular need in a manner suitable for the direct sale to the user applicable to this merchandise, they would be considered a set pursuant to GRI 3(b) by virtue of GRI 6.

Therefore, based upon GRI 6 and the reasoning in HQ 088774, the Trio Barrettes, which consists of barrettes classifiable under subheadings 9615.11.40 and 9615.11.50, HTSUS, meets requirement (a) in Explanatory Note 3(b)(X) and constitutes a set as defined in GRI 3(b).

Explanatory Note 3(b)(VIII) (p..4) states that:

> [t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

With regard to the Trio Barrettes, the essential character of the set is not readily apparent. When the component which imparts the essential character of the goods at issue cannot be determined, classification is ascertained by utilizing GRI 3(c). It states that:

> [w]hen goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Based upon GRI 3(c), the Trio Barrettes is classifiable under subheading 9615.11.50, HTSUS.

Holding:

The Trio Barrettes constitutes a set as defined in GRI 3(b) and is classifiable under subheading 9615.11.50, HTSUS, as other combs, hair-slides and the like, of hard rubber or plastics.

Effect on Other Rulings:

NY 815120 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Court of Appeals for the Federal Circuit

ITEM CO. D/B/A, BLUE RIDGE: ITEM CO., PLAINTIFF-APPELLEE *v.* UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 95–1524

(Decided October 11, 1996)

J. Kevin Horgan, deKieffer, Dibble & Horgan, of Washington, D.C., argued for plaintiff-appellee.

Mikki Graves Walser, Commercial Litigation Branch, Civil Division, Department of Justice, International Trade Field Office, of New York, New York, argued for defendant-appellant. With her on the brief was *Joseph I. Liebman*, Attorney in Charge. Also on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director, Department of Justice, of Washington, D.C. Of counsel on the brief was *Beth C. Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of New York, New York.

Appealed from: United States Court of International Trade.
Judge MUSGRAVE.

Before RICH, CLEVENGER, and RADER, *Circuit Judges*.

RICH, *Circuit Judge*.

Defendant-appellant the United States (government) appeals a judgment of the Court of International Trade (CIT), holding that plaintiff-appellee The Item Company, d/b/a/Blue Ridge: The Item Company's (Blue Ridge's) TV remote control caddies, which are known commercially as TV Companions, are correctly classified under subheading 6307.90.9989 of the 1995 Harmonized Trade Schedule of the United States (HTSUS) as other made up textile articles, dutiable at 7% *ad valorem* and not subject to quota restraints. *Item Co. v. United States*, No. 95–05–00617, 1995 WL 450964 (Ct. Int'l Trade 26 July 1995). We affirm.

I

BACKGROUND

This case involves a denial by Customs of protests by Blue Ridge, challenging the classification of merchandise pursuant to 28 U.S.C. § 1581(a).

A. *The Merchandise:*

The TV Companions at issue include stuffed, toy-like figures of textile material made in various forms, including animals and human characters. The figures are designed to be both humorous and decorative, and the TV Companions have names like "TV Bunny," "TV Duck," "Channel Cat," "TV Hound," and "TV Kitty." Each TV Companion is weighted with pellets on the interior bottom portion of the figure. Attached to the bottom edge of each figure is a flat textile panel with pockets designed to hold small magazines (e.g., a television guide) and a remote control. The panel is designed to hang from the weighted figure when the figure is placed on furniture, televisions, or ledges.

B. *Proceedings Below:*

The United States Customs Service (Customs) classified the merchandise as "other furnishing articles" under subheading 6304.92.00 or 6304.93.00, depending upon the textile materials involved. Then, on 9 March 1995, Customs excluded the merchandise because Blue Ridge did not have a textile visa from the Peoples Republic of China. Under an agreement between the United States and China, specific textiles from China are not permitted entry unless accompanied by a Chinese visa. Per the agreement, textiles and textile products are classified according to quota categories. Articles falling within quota category 666 are subject to textile quota restrictions, and articles classified under HTSUS heading 6304 fall under quota category 666.

Blue Ridge protested the exclusion on 13 March 1995, claiming that its articles are properly classified as "other made up articles" under subheading 6307.90.9989, dutiable at 7% *ad valorem* and not subject to quota restraints. Customs denied Blue Ridge's protest on 11 April 1995, and Blue Ridge appealed to the CIT.

The CIT reversed Customs and stated that "Congress did not intend for heading 6304 to include items with characteristics other than flat, protective, and decorative." Slip op. at 11. It held that the TV Companions are properly classified under subheading 6307.90.9989, and Customs should not have excluded these articles from entry into the United States. *Id.* The CIT subsequently denied the government's 28 August 1995 motion to stay the CIT's judgment directing Customs to release the merchandise posthaste. The government now appeals.

II

ANALYSIS

The issue is whether the TV Companions have been classified under the appropriate tariff provision. Resolution of that issue entails construing specific terms in the tariff provisions and determining whether the TV Companions come within the description of such terms as properly construed. We review the CIT's construction of terms in tariff provisions *de novo*, and we review the CIT's determination of whether the merchandise at issue comes within the description of such terms as properly construed for clear error. *Stewart-Warner Corp. v. United*

States, 748 F.2d 663, 664–65, 3 Fed. Cir. (T) 20, 22 (Fed. Cir. 1984); *see also Lynteq, Inc. v. United States*, 976 F.2d 693, 696 (Fed. Cir. 1992) (the meaning of tariff provision terms is a question of law subject to *de novo* review). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Both parties agree that the TV Companions are properly classified under one or more of the subheadings of Chapter 63 of the HTSUS. The pertinent portions of that chapter read, with our emphasis, as follows:

6304.92.00	Other made up textile articles; *other furnishing articles*, excluding those of heading 9404[1]; other[2]: not knitted or crocheted, of cotton	7.1%.
6304.93.00	Other made up textile articles; *other furnishing articles*, excluding those of heading 9404; other: not knitted or crocheted, of synthetic fibers	10.5%.
6307.90.9989	Other made up textile articles; *other made up articles*, including dress patterns; other[3]; other[4]; other[5]; other[6]; other[7]	7%.

As may be seen by our emphasis above, we must decide whether Blue Ridge's TV Companions are "other furnishing articles," as urged by the government, or "other made up articles," as urged by Blue Ridge. To do this, we find it unnecessary to conclusively decide what the term "furnishings" means as used within heading 6304. Rather, we need only construe that term to the extent necessary to decide whether the CIT erred in its holding that the TV Companions do not come under heading 6304, and thus fall under heading 6307. Therefore, we do not decide whether the CIT's statement that "it is clear * * * that Congress did not intend for heading 6304 to include items with characteristics other than flat, protective and decorative," slip op. at 11, is accurate.

Both 6304 and 6307 are general headings or basket provisions—the word "other" makes this clear. Such headings "catch" merchandise which is similar to that previously enumerated, but which is not specifically listed. In cases like the instant one, where we must decide whether a specific type of merchandise falls within a general heading, we use the

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[1] Heading 9404 includes the following: mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes, and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered.

[2] I.e., not bedspreads.

[3] I.e., not floorcloths, dishcloths, dusters, and similar cleaning cloths; or lifejackets and lifebelts.

[4] I.e., not labels; cords and tassels; corset lacings, footwear lacings, or similar lacings; surgical drapes; toys for pets, of textile material; or wall banners, of man-made fibers.

[5] I.e., not surgical towels; cotton towels of pile or tufted construction; pillow shells, of cotton; shells for quilts, eiderdowns, comforters, and similar articles of cotton.

[6] I.e., not national flags.

[7] I.e., not other towels of cotton; other towels of man-made fibers; furniture movers' pads of cotton; or furniture movers' pads of man-made fibers.

rule of statutory construction known as *ejusdem generis,* which means of the same kind, class, or nature.

"As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* [by name] in order to be classified under the general terms." *Sports Graphics, Inc. v. United States,* 24 F.3d 1390,1392 (Fed. Cir. 1994) (Citing *Nissho-Iwai Am. Corp. v. United States,* 641 F. Supp. 808, 810 (Ct. Int'l Trade 1986)). The headings preceding heading 6304 list the following articles by name: blankets, traveling rugs, bed linen, table linen, toilet linen, kitchen linen, curtains (including drapes), interior blinds, curtain valances, and bed valances. Heading 6304 itself lists three more items: bedspreads, wall hangings, and pillow covers. Therefore, merchandise properly classified under 6304 must possess the same essential characteristics as these articles. We note that heading 6304 specifically excludes articles under heading 9404, namely, mattress supports; articles of bedding and similar furnishings (for example, mattresses, quilts, eiderdowns, cushions, pouffes, and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered. Finally, the *Explanatory Notes* for heading 6304 read, in part, as follows:

> These articles include wall hangings and textile furnishings for ceremonies (e.g., weddings or funerals); mosquito nets; bedspreads (but *not including* bed coverings of *heading 94.04);* cushion covers, loose covers for furniture, antimacassars; table covers *(other than* those having the characteristics of floor coverings * * *); mantlepiece runners; curtain loops; valances *(other than* those of *heading 63.03).*[8]

In the instant case, all of the witnesses and the CIT agreed that the essential characteristic of the TV Companions is their function as organizers. Slip op. at 10–11. From our reading of the HTSUS and the *Explanatory Notes,* we do not believe that an essential characteristic or purpose uniting the articles enumerated *eo nomine* in headings 6301–6304 is to function as organizers. We therefore agree with the CIT's holding that the TV Companions are not properly classified under heading 6304. Slip op. at 11.

Heading 6307 is an even more generic basket provision than heading 6304. Merchandise that does not fall within one of headings 6301–6306 falls within 6307. The *Explanatory Notes* to heading 6307 read, in part, as follows:

> This heading covers made up articles of any textile material which are *not included* more specifically in other headings * * *.
>
> It includes, in particular:
>
> (1) Floor cloths, dish cloths, dusting cloths and similar cleaning cloths * * *.

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[8] *Explanatory Notes to the Harmonized Commodity Description and Coding System.* We agree with Blue Ridge's assertion that the term "furnishings" is ambiguous and derives its meaning from the context in which it is used. Therefore, we find it beneficial, as did the CIT, to consult the *Explanatory Notes.*

(2) Life-jackets and life-belts.
(3) Dress patterns, usually made of stiff canvas * * *.
(4) Flags, pennants and banners, including bunting for entertainments, galas or other purposes.
(5) Domestic laundry or shoe bags, stocking, handkerchief or slipper sachets, pyjama or nightdress cases and similar articles.
(6) Garment bags (portable wardrobes) * * *.

* * * * * * *

(12) Tea cosy covers.
(13) Pin Cushions.[9]

We agree with the CIT's observation that the items in the *Explanatory Notes* to heading 6307 have little in common. Slip op. at 11. This is not surprising since, as the *Explanatory Notes* provide, it is an ultimate catch-all provision within Chapter 63. The CIT determined, nevertheless, that TV Companions share their "organizer function" with articles such as shoe bags and pajama bags, which similarly provide storage for small items. *Id.* Therefore, the CIT concluded that TV Companions are more properly placed among the 6307 items than among the 6304 items. *Id.* We agree.

III

CONCLUSION

For the above reasons, we hold that the evidence of record supports the CIT's decision. Therefore, the CIT's classification finding that the TV Companions are properly classified under subheading 6307.90.9989 of the HTSUS as "other made up articles," dutiable at 7% *ad valorem* and not subject to quota restraints, is affirmed.

AFFIRMED.

[9] *Id.* at 867–68.

EXECUTONE INFORMATION SYSTEMS, APPELLANT *v.*
UNITED STATES, APPELLEE

Appeal No. 95–1527

(Decided September 24, 1996)

Michael P. Maxwell, of Los Angeles, California, argued for plaintiff-appellant.

Barbara Silver Williams, Civil Division, Commercial Litigation Branch, Department of Justice, International Trade Field Office, of New York, New York, argued for defendant-appellee. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director, of Washington, D.C., and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Beth C. Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of New York, New York.

Appealed from: United States Court of International Trade.
Judge RESTANI.

Before MICHEL, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and CLEVENGER, *Circuit Judge*.

MICHEL, *Circuit Judge*.

Executone Information Systems ("Executone") appeals the final judgment of the United States Court of International Trade ("CIT") denying Executone's motion for summary judgment, granting the government's motion for summary judgment, and holding that Customs is not required to reliquidate Executone's entries under 19 U.S.C. § 1520(c)(1). *Executone Information Systems v. United States*, 896 F. Supp. 1235 (Ct. Int'l Trade 1995). The appeal was submitted for decision after oral argument on June 6, 1996. Because Executone failed, as a matter of law, to demonstrate a clerical error, mistake of fact or other inadvertence that would entitle it to relief under 19 U.S.C. § 1520(c)(1), we affirm.

BACKGROUND

Executone is an importer of telephone handsets manufactured in the Dominican Republic and purchased from Q-Tel Paragüe Industrial Itabo ("Q-Tel"). Executone made an entry of telephone handsets on October 23, 1991 and another on November 4, 1991. As was its usual practice, Executone claimed duty-free treatment for these entries under the Caribbean Basin Economic Recovery Act ("CBERA") by placing the letter "E" before the tariff classification on Customs Form 7501.[1] Thus, the merchandise was entered duty-free under subheading E 8517.10.00, Harmonized Tariff Schedule of the United States ("HTSUS"). At that time, however, importers were required to submit a "Form A" with the entry to certify eligibility for duty-free treatment under CBERA.[2] Alter-

[1] To be eligible for duty-free treatment under CBERA, the goods "must be produced in a beneficiary developing country ('BDC') by a substantial manufacturing process which substantially transforms the article, have value added in the BDC equaling 35% of dutiable value, and be directly imported from the beneficiary country."

[2] This requirement was subsequently eliminated. *See* Treas. Dec. 94–47 (May 17, 1994). However, there is no dispute that the requirement existed at the time the entries at issue occurred.

natively, the importer was required to supply a bond at the time of entry. Executone filed neither a Form A nor a bond for the two entries at issue, although it was Q-Tel's customary practice to submit Form A's to Executone's broker, Radix Group International ("Radix"), in a package with the other commercial documents necessary to file a Customs entry.

In early December of 1991, Customs issued Notices of Action indicating that the entries were in the process of being liquidated under 8517.10.00, HTSUS, at a duty rate of 8.5% *ad valorem*. The Notices of Action also indicated the reason for reclassification at the 8.5% rate as: "No documentation furnished with entry to support duty-free entry under the CBI." Customs liquidated the two entries in December of 1991, and Executone paid the additional duties on January 3, 1992.

Executone, upon learning of the additional duties, requested that Q-Tel send the necessary Form A's to Radix by facsimile, and instructed Radix to file the faxed Form A's with the Customs Service. Although Executone requested that Radix submit the Form A's a total of four times, Radix failed to do so.[3] Executone also requested that Radix file a formal protest with Customs. However, a protest regarding the entries was not filed within 90 days after notice of liquidation as required by 19 U.S.C. § 1514(a) (1994). Finally, in June of 1992, Executone obtained new Form A's and submitted them to Radix for filing. Radix submitted these new Form A's to Customs on July 14, 1992 with a request to reliquidate the entries under 19 U.S.C. § 1520(c)(1). Executone believed the request to reliquidate under section 1520(c)(1) was appropriate because the failure to submit the Form A's on entry was the result of Q-Tel's inadvertent failure to include the Form A's with the other documents shipped to Radix. Customs denied the request to reliquidate. Executone timely protested the denial of its request to reliquidate, and Customs denied the protests because "[n]o supporting documentation other than Form A [was] submitted."

Executone filed a complaint in the CIT in late May of 1994. On October 13, 1994, Executone filed a motion for summary judgment, and the government cross-moved. The CIT granted the government's cross-motion on July 19, 1995. The CIT first concluded that the determination of whether certain merchandise is eligible for duty-free treatment under programs such as CBERA is a classification dispute and, as such, a legal determination. The CIT also concluded that Customs had made a correct legal determination as to the classification of Executone's merchandise on the basis of the facts presented. The CIT next inquired whether Customs' legal determination resulted from a mistake of fact or inadver-

[3] It is unclear precisely why Radix failed to file the Form A's. In its brief, Executone contends that the Form A's were not filed because faxed forms are unacceptable. However, a declaration of Radix's Director submitted on behalf of Executone states that the Form A's were not filed solely due to inadvertence.

tence which could be corrected under section 1520(c)(1).[4] The trial court acknowledged that the alleged mistake of fact or inadvertence need not be manifest in the record before Customs, but rather may be demonstrated at trial by introduction of evidence that explains that which was unsatisfactorily explained to Customs. The court then concluded that, in the case of missing documentation required by statute or regulation, the importer must prove at least that, but for a mistake of fact or other inadvertence, proper documentation would have been filed at the time required by law and that simple failure of the broker to file proper documentation does not satisfy section 1520(c)(1). The trial court concluded Executone was unable to meet this burden.

ANALYSIS

A. *Standard of Review:*

Summary judgment is proper in the CIT "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT Rule 56(d). This court reviews the CIT's summary judgment decision "for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist." *Texaco Marine Servs., Inc. v. United States,* 44 F.3d 1539, 1543 (Fed. Cir. 1994) (quoting *St. Paul Fire & Marine Ins. Co. v. United States,* 6 F.3d 763, 767 (Fed. Cir. 1993)).

Two issues are central to the proper determination of this appeal: (1) whether Customs' decision to liquidate the entries at issue resulted from an error in the construction of the law since that alone would prohibit the application of section 1520(c)(1); and (2) whether Executone sufficiently demonstrated "a clerical error, mistake of fact, or other inadvertence."

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[4] Specifically, section 520(c)(1) of the Tariff Act of 1930 provides:

> Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in electronic transmission, *not amounting to an error in the construction of a law,* adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction;
>
> * * * * * * *

19 U.S.C. § 1520(c)(1) (emphasis added).

The regulation implementing section 1520(c)(1) states:

> Correction pursuant to * * * 19 U.S.C. 1520(c)(1), may be made in any entry, liquidation, or other Customs transaction if the clerical error, mistake of fact, or other inadvertence:
>
> (1) Does not amount to an error in the construction of a law;
>
> (2) Is adverse to the importer; and
>
> (3) Is manifest from the record or established by documentary evidence.
>
> * * * * * * *

19 C.F.R. § 173.4(b) (1996).

B. *Customs' decision to liquidate at the 8.5% duty rate is not based on a legal determination and thus cannot be an error in the construction of a law:*

The government argues that the facts of this case present a mistake of law, and it is undisputed that 19 U.S.C. § 1520(c)(1) does not apply to errors in the construction of the law. Thus, our initial inquiry must be whether Executone has alleged a mistake of law or a mistake of fact.

The distinction between mistakes of law and mistakes of fact under section 1520(c)(1) has been defined as follows:

> [M]istakes of fact occur in instances where either (1) the facts exist, but are unknown, or (2) the facts do not exist as they are believed to. Mistakes of law, on the other hand, occur where the *facts are known,* but their *legal consequences* are not known or are *believed to be different than they really are.*

Hambro Automotive Corp. v. United States, 603 F.2d 850, 855 (CCPA 1979). That the facts of this case, as alleged, present a mistake of fact and not an error in the construction of the law cannot reasonably be disputed, in light of our recent decision in *Aviall of Texas, Inc. v. United States,* 70 F.3d 1248 (Fed. Cir. 1995) *(Aviall II).*[5]

There, Aviall had regularly filed blanket certifications for importations of aircraft engines and parts, but inadvertently allowed the blanket certification to expire. *Aviall II,* 70 F.3d at 1249. When notified by Customs that the certification had expired, Aviall immediately renewed it. *Id.* However, in the interim, Aviall continued to import engine parts. Id. Customs liquidated the interim entries several months later and denied duty-free treatment due to Aviall's failure to timely renew the certificate. *Id.* Aviall protested on the ground that its failure to renew was a clerical error correctable pursuant to section 1520. *Id.* The CIT determined that Aviall presented a mistake of fact rather than a mistake of law and determined that Aviall's failure to renew the certification was inadvertent. *Aviall of Texas, Inc. v. United States,* 861 F. Supp. 100, 107 (Ct. Int'l Trade 1994) *(Aviall I).* In so doing, the CIT noted that:

> In the statement of material facts, the admissions of Aviall's broker disclose that the failure to file a new yearly blanket certification was due to the fact that the broker "forgot" to renew the blanket certification for the period encompassing these entries. The situation of Aviall and its broker, therefore, falls precisely within the language of *C.J. Tower:* "[A] fact which is thought to exist [existence of a valid annual certification], in reality [did] not exist."

Aviall I, 861 F. Supp. at 107 (alteration in original). Although the only issue specifically addressed on appeal was whether Aviall's conduct constituted inadvertence or unexcusable negligence, we specifically

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[5] At oral argument, counsel for the United States contended that *Aviall II* was not applicable because it did not present a 19 U.S.C. § 1520(c)(1) issue. We find no merit in this argument. While it is true that Aviall actually filed a protest rather than a request for reliquidation, Aviall based its protest on a clerical error as defined in 19 U.S.C. § 1520(c)(1) and the case was analyzed under that statute. Indeed, the introductory paragraph to that opinion states "[u]nder 19 U.S.C. § 1520(c)(1) (1988) (amended 1993), the trial court permitted Aviall to renew its blanket certification for entry of aircraft parts. Because the Court of International Trade properly applied section 1520(c)(1), this court affirms." 70 F.3d at 1248.

noted that section 1520(c)(1) could not be used to correct a mistake in the construction of the law, 70 F.3d at 1250, thus implicitly accepting the determination of the CIT that the case presented a mistake of fact. Here too, Executone has alleged a mistake of fact: namely, Executone believed, at the time of importation, that valid Form A's had been filed when, in fact, they had not.

Our conclusion today is further supported by our previous decision in *ITT Corp. v. United States*, 24 F.3d 1384 (Fed. Cir. 1994) *(ITT Corp. II)*. There, ITT imported cast-iron automobile parts, which Customs liquidated at a rate of 3.1%. 24 F.3d at 1386. Within one year after liquidation, ITT filed claims with Customs pursuant to 19 U.S.C. § 1520(c)(1) seeking reliquidation of each entry as duty-free based on new evidence indicating the castings were improperly classified and alleging that a mistake of fact occurred in the initial creation of the broker's records which resulted in the subsequent misclassification of the entries. *Id.* Customs denied the requests on the ground that the errors involved the construction of the law and denied ITT's protests of the denials. *Id.* The CIT disagreed with Customs and held that ITT presented a mistake of fact because, when filling out the forms, the importer's agent used company records applicable to different merchandise and misunderstood the nature of the imported merchandise. *ITT Corp. v. United States*, 812 F. Supp. 213, 216 (Ct. Int'l Trade 1993) *(ITT Corp. I)*. However, the trial court held ITT was not entitled to relief because it failed to establish the mistake of fact before the reliquidation determination. *Id.* at 217. In reviewing the CITs decision, we focused on the requirements of notice to Customs and substantiation, but also noted that the government did not contest the CIT's finding that a mistake of fact had occurred and that the finding was amply supported by the rec6rd and not clearly erroneous. *ITT Corp. II*, 24 F.3d at 1388.[6]

The government argues that assertions such as Executone's are challenges to Customs' classification of merchandise and that such classification determinations are conclusions of law which may only be addressed by timely protesting the liquidation. In stating its position, however, the government relies solely on decisions of the CIT. While these decisions admittedly provide some support for the government's theory, each of the decisions not only is non-binding, but also is readily distinguishable on its facts from the case at bar.

First, the government relies primarily on *Occidental Oil & Gas Co. v. United States*, 13 CIT 244 (1989). There, Occidental claimed certain oil well equipment importations were entitled to duty-free treatment because the equipment consisted of returned goods of American origin. *Id.* at 244–45. However, Occidental failed to file proof of United States ori-

[6] We note also that our decision conforms with *United States v. C.J. Tower & Sons of Buffalo Inc.*, 499 F.2d 1277 (CCPA 1974). There, aircraft fuel cells were imported from Canada and entered as dutiable. *Id.* at 1278. The importer later requested that the fuel cells be reliquidated under section 1520(c)(1) because the importer had not been aware that the fuel cells could be imported duty-free as an emergency defense purchase. *Id.* at 1279. The government contended that the importer made an error in the construction of the law by failing to timely protest the original liquidation. *Id.* at 1282. The CCPA dismissed this argument, stating there was a mistake of fact in that the importer did not know the fuel cells were emergency war material even though, in fact, they were. *Id.*

gin. *Id.* at 245. Customs repeatedly notified Occidental that proof of origin had not been received and then eventually liquidated the merchandise as dutiable. *Id.* Occidental filed a request for reliquidation under 19 U.S.C. § 1520(c)(1), which request was denied by Customs. *Id.* Occidental also filed a protest of Customs' denial of its request for reliquidation, which was also denied. *Id.* The CIT held that reliquidation pursuant to 19 U.S.C. § 1520(c)(1) was not appropriate where duty-free entry was denied solely because the importer failed to submit documentation in support of its claim for duty-free treatment. In so deciding, the court stated:

> The courts have consistently held that section 1520(c)(1) may only be used to correct mistakes of fact or inadvertence and may not be used to rectify allegedly incorrect interpretations of the law. * * * It is well settled that a determination by the Customs Service that merchandise is covered by a certain provision of the TSUS is a conclusion of law. Therefore, an erroneous classification of imported merchandise is not remedial as a clerical error, mistake of fact or inadvertence under section 1520(c)(1).

Id. at 246–47 (citations omitted). Although, taken in isolation, this language may support the government's position, a close reading of this decision reveals that, as a whole, the decision is not contrary to our decision today because Occidental was never under a mistaken impression of fact. Rather, Occidental had acknowledged on the entry form that it had not provided the necessary documentary proof to establish a right to duty-free entry. In addition, Occidental mistakenly believed that under the law its prompt and reasonable efforts to obtain the documentation excused its failure to file such documentation. *Id.* at 245–46. Thus, Occidental's mistake was not one of fact, but truly one of law. As this appeal presents a mistake of fact, *Occidental* cannot apply here.

Second, the government also relies on *Cavazos v. United States,* 9 CIT 628 (1985). In *Cavazos*, as in *Occidental*, the importer requested duty-free treatment on the entry form, claiming that the goods were American made, but failed to provide documents supporting its claim of duty-free status. 9 CIT at 629. The CIT held Cavazos failed to state a claim for relief under section 1520(c)(1) because Cavazos' allegation of a mistake of fact was really a challenge to Customs' legal determination. *Id.* at 631. Once again, this case is readily distinguishable; Cavazos apparently did not argue that he mistakenly thought the appropriate documents had been filed, but only that Customs had incorrectly classified the merchandise.

Third, the government relies on *AT&T Int'l v. United States,* 861 F. Supp. 95 (Ct. Int'l Trade 1994). There, AT&T claimed duty-free treatment for telephone parts and equipment which were manufactured in the United States and returned from Egypt as defective. 861 F. Supp. at 96. However, once again, the importer failed to submit evidence supporting its claim of duty-free status at the time of entry. *Id.* After giving AT&T notice of the deficiency and a chance to correct it, Customs liquidated the entries. *Id.* AT&T timely filed a request to reliquidate, alleg-

ing that the documents were not submitted due to clerical error or inadvertence. *Id.* at 96–97. In holding that AT&T had failed to present an actionable clerical error, mistake of fact or inadvertence, the court analogized to both *Cavazos* and *Occidental* and quoted the language in *Occidental* indicating that Customs had made a legal determination. *Id.* at 99–100. Although, based on a superficial reading of this decision, one could find support for the government's position, a close reading demonstrates that the trial court did not deny relief on the ground that the importer was alleging an error in the construction of the law, but rather on the grounds that the importer had failed to meet its burden of showing either inadvertence or a mistake of fact.

In short, we are not persuaded of the applicability of any of the three decisions relied on by the government or the CIT. We first note that this appeal does not present a typical challenge to a Customs classification where Customs evaluated the merchandise and, based on its construction of the tariff schedule, determined into which of two categories the merchandise must be placed, *e.g.*, whether a pager should be classified as a radio receiver or as a signaling apparatus. In such a case, there is no dispute that the only proper course of action would have been to file a timely protest under section 1514. Rather, Customs has never disputed that Executone's merchandise would properly qualify for duty-free treatment under CBERA had Form A's been properly submitted. Moreover, as pointed out by Executone, accepting the government's argument that this case involved a mistake of law would lead to the absurd result that section 1520(c)(1) could never be used to correct a liquidation because then all liquidations would involve a question of law. Executone argues, persuasively, that each erroneous liquidation may result from a mistake of law *(e.g.*, whether the proper meaning of specific terms in the tariff provision have been correctly determined or whether a given type of royalty is included in dutiable value) or a mistake of fact *(e.g.*, whether the importer erroneously described the merchandise on the invoice used to prepare the entry or misplaced a decimal point on an invoiced price resulting in an incorrect value).

Moreover, our decision today follows both of our earlier decisions, discussed above. In contrast to the three CIT cases cited by the government, these decisions are binding precedent and they are factually apposite. Here, based on the facts as alleged, the classification of Executone's merchandise at an 8.5% *ad valorem* rate was clearly the result of a mistake of fact variety—Executone thought Form A's had been filed when, in fact, the forms had not been. This is precisely the type of error which is properly correctable through the application of 19 U.S.C. § 1520(c)(1).

C. *Executone, however, has not demonstrated a mistake of fact, clerical error or other inadvertence:*

As, despite the government's argument, we hold that the facts of this case do not present the type of legal mistake expressly excluded from consideration under 19 U.S.C. § 1520, we must next decide whether

Executone has sufficiently demonstrated, rather than merely alleged, "a clerical error, mistake of fact, or other inadvertence" as those terms are used in section 1520(c)(1). In applying that section, the trial court explained:

> In order to protect the viability of protest under 19 U.S.C. § 1514 and whatever documentary requirements exist in the statute and regulations, the court concludes that in the case of missing documentation required by statute or regulation, the importer must prove more than that it can produce documentation at the time of trial. At the very least, the importer must prove that, but for a mistake of fact or other inadvertence, proper documentation would have been filed *at the time required by law*. Simple failure of the broker to file proper documentation does not satisfy § 1520(c)(1).
>
> Plaintiff does not allege it can meet the burden described here. It had ample opportunity to demonstrate proof of origin in a timely manner, and it does not claim that proper documentation existed at the time of entry and would have been filed but for an inadvertence. Plaintiff's attempts to jury rig the proper documentation do not suffice. Under the facts of this case, to allow filing of proof of origin now, or even within one year of liquidation, would render a nullity the then-existing requirement that proof of entry be filed at entry or that a bond be posted and the proof be filed 60 days later.

(citations omitted).

Executone contends on appeal that the trial court effectively held that, in order to fulfill its burden, Executone must allege that the required documentation had been prepared at the time of entry. If this were truly what the trial court intended, it would clearly be incorrect and inconsistent with our previous decisions. For example, such a holding would be inconsistent with *ITT Corp. II*, where we held that an importer could present proof of inadvertence or mistake at any time up to trial, and in which only incorrect documentation was in existence at the time of entry. 24 F.3d at 1386. Such a holding would also be inconsistent with *Aviall II*, because in that case the only document that existed at the time of entry was out of date. 70 F.3d at 1248. Thus, it cannot be the law that proper documentation must exist at the time of entry.

We agree with the government that the CIT's decision is only fairly read as holding that an importer must show that its failure to submit documentation on a timely basis was due to inadvertence, rather than merely showing it failed to submit the documentation. This is a more reasonable interpretation of the trial court's opinion and is legally supportable under the existing precedent.

Indeed, *ITT Corp. II* holds that reliquidation under section 1520(c)(1) requires both notice of the alleged mistake of fact or inadvertence and substantiation. 24 F.3d at 1387. The notice must occur within one year of liquidation and must inform Customs that a mistake of fact or inadvertence is being asserted with sufficient particularity to allow remedial action. *Id.* With regard to substantiation, the inadvertence or mistake of fact must be either manifest from the record, *i.e.*, "apparent to Customs

from a facial examination of the entry and the entry papers alone," or it must be established by documentary evidence. *Id.* The latter proof of inadvertence or mistake of fact may be proven after the expiration of the one year period, such as at a trial *de novo*. *Id.* at 1388–89. Thus, while the proper documentation need not have existed at the time of entry, the importer must prove, either before Customs or the CIT, that the proper documentation did or would have existed at the time of entry and would have been filed, but for some mistake of fact or inadvertence at the time of entry.

Under this interpretation of the trial court's opinion, the trial court's determination that Executone failed to demonstrate "a clerical error, mistake of fact, or other inadvertence" is legally correct in light of the very limited proof introduced by Executone.[7] While it may be true that Executone's intention to claim duty-free status is manifest from the entry records, it is not manifest from the entry records that Executone's failure to submit the Form A's was due to a mistake of fact or inadvertence, rather than due to intentional or negligent inaction. *See ITT Corp. II,* 24 F.3d at 1387. Further, Executone has failed to submit subsequent documentary evidence sufficient to prove a clerical error, mistake of fact or other inadvertence. Executone's "proof" below consisted of: (1) the contention that inadvertence is, by its very nature, difficult to document; (2) Executone's course of conduct with respect to the entries of telephone handsets that occurred both before and after the entries at issue; (3) a declaration of Pam Osterland (Director of Radix) with several attached exhibits; and (4) the contention that accurate Form A's have now been submitted. However, Executone made no attempt to explain what constituted the inadvertence, mistake of fact or clerical error, but merely stated such an inadvertence, mistake of fact or clerical error had occurred. We do not accept such conclusory allegations, which do nothing more than track the language of the relevant statute. *See Degussa Canada Ltd. v. United States,* 87 F.3d 1301, 1303 (Fed. Cir. 1996) (citing *Fabrene, Inc. v. United States,* 17 CIT 911, 913 (1993)).

Likewise, Executone makes no attempt to explain why it failed to file Form A's until after the time for filing a protest had lapsed. Executone's "proof" of inadvertence falls woefully short and, if anything, establishes only that Executone acted negligently. Executone repeatedly asked Radix to file the Form A's. Radix, however, failed to do so. From the evidence currently in the record, it appears that Radix employees negligently failed to carry out Executone's instructions and Executone negligently failed to ensure that its agent timely filed the Form A's. Executone, by repeating its request, obviously knew the forms had not yet been filed, yet failed to act.

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[7] It is undisputed that Executone notified Customs of the alleged mistake of fact or inadvertence within the one year period.

CONCLUSION

For all the foregoing reasons, the decision is affirmed.

AFFIRMED.

UNITED STATES, PLAINTIFF-APPELLEE *v.* CHERRY HILL TEXTILES, INC., DEFENDANT, AND INTERNATIONAL CARGO AND SURETY INSURANCE CO., DEFENDANT-APPELLANT

Appeal No. 96–1097

(Decided May 5, 1997)

Wayne Jarvis, Hodes & Pilon, of Chicago, Illinois, argued for defendant-appellant. With him on the brief were *Michael G. Hodes* and *James L. Sawyer*.

Barbara Silver Williams, Commercial Litigation Branch, Civil Division, Department of Justice, International Trade Field Office, of New York, New York, argued for plaintiff-appellee. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director, of Washington, D.C., and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Ted Kundrat*, Office of Assistant Chief Counsel, United States Customs Service, of Indianapolis, Indiana.

Appealed from: United States Court of International Trade.
Senior Judge NEWMAN.

Before LOURIE, CLEVENGER, and BRYSON, *Circuit Judges*.

BRYSON, *Circuit Judge*.

This case requires us to construe 19 U.S.C. § 1514, which provides that, with certain narrowly defined exceptions, the Customs Service's liquidation of an entry is "final and conclusive" as to all parties unless an administrative protest is filed challenging the liquidation. International Cargo & Surety Insurance Co. (IC&S), the surety for importer Cherry Hill Textiles, Inc. (Cherry Hill), argues that the protest requirement of section 1514 applies to actions brought by importers or sureties for the refund of duties paid, but does not apply to enforcement actions brought by the government to collect underpayments of duties. For that reason, IC&S contends that it should be allowed to challenge the liquidation at issue in this government enforcement action, even though it did not file a timely protest of the liquidation with the Customs Service. The Court of International Trade rejected that argument, and so do we.

We agree, however, with IC&S's less sweeping contention that it was not required to file a protest in the particular circumstances of this case, *i.e.*, when Customs purported to liquidate the entry after it had already been liquidated by operation of law. The trial court therefore should not have granted summary judgment in favor of the government on the ground that IC&S's failure to protest the second liquidation of the entry barred it from challenging that liquidation.

I

Cherry Hill was the importer of record of textile dyeing machines from Taiwan that were entered as duty free through the Port of Newark, New Jersey, on September 18, 1987. After a delay of more than 13 months from the date of entry, Customs on October 28, 1988, liquidated the entry as dutiable in the amount of $12,220.62. The government gave notice of the liquidation to Cherry Hill and subsequently demanded payment from Cherry Hill's surety, appellant IC&S, under the surety bond. IC&S refused to make the payment. It did not, however, file a formal protest under 19 U.S.C. § 1514 of either the liquidation or the demand for payment.

After the passage of the 90-day period within which a protest could be filed, the government filed an enforcement action in the Court of International Trade seeking recovery of the claimed $12,220.62 in assessed duties. IC&S interposed several defenses to the enforcement action. The government then moved for summary judgment, contending that IC&S's failure to file a protest against either the liquidation or the demand for payment under the bond rendered the October 28, 1988, liquidation "final and conclusive" within the meaning of 19 U.S.C. § 1514 and therefore precluded judicial review of IC&S's affirmative defenses to the liquidation. In response, IC&S argued that the provision of section 1514 that makes unprotested liquidations "final and conclusive" applies to actions brought by importers or sureties to recover excess duty deposits, but not to government enforcement actions for unpaid duties. The court rejected that argument and granted summary judgment to the government for the full amount of its claim for duties, plus interest. IC&S then perfected an appeal to this court.

II

Section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514, plays a central role in the system for adjudicating rights under the Customs laws. With certain specified exceptions, it requires that an administrative protest be filed if an importer or surety wishes to challenge the Customs Service's liquidation of a particular entry, and it provides that if such a protest is not filed, the Customs Service's decision, "including the legality of all orders and findings entering into the same * * * shall be final and conclusive." 19 U.S.C. § 1514(a). It is undisputed that an administrative protest must be filed if an importer or surety wishes to file suit in the Court of International Trade challenging the liquidation of a Customs entry. The principal issue in this case is whether an importer or surety must file such an administrative protest if the importer or surety wishes to defend against a government enforcement action for the underpayment of duties by challenging the lawfulness of the liquidation.

A

IC&S argues that section 1514 is the product of history, and so it is. We therefore turn to the history of section 1514 for guidance as to its proper construction. While IC&S claims that there is no historical support for

applying the protest requirement of section 1514 in the context of government enforcement actions, our study of the historical materials leads us to the opposite conclusion; indeed, we find that the historical materials provide compelling evidence that the Court of International Trade reached the correct conclusion on that issue. Moreover, while there is no binding judicial authority on this point, the court decisions that touch on the issue support the conclusion reached by the Court of International Trade.

The first tariff statutes contained no mechanism for importers to challenge excessive duty charges. *See* Act of July 4, 1789, ch. 2, 1 Stat. 24; Act of July 31, 1789, ch. 5, 1 Stat. 29; Act of Aug. 4, 1790, ch. 35, 1 Stat. 145; Act of Mar. 2, 1799, ch. 22, 1 Stat. 627. For years, therefore, an importer who objected to a duty as excessive had to pay the duty and then sue the customs collector for a refund in a common law court. As that practice developed, the courts required the importer to give notice of the claim for a refund at the time the duties were paid so that the collector could retain the duties in order to be able to refund them in the event of an adverse court ruling. *See Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 153 (1836). In 1845, Congress codified the protest requirement by requiring, as a prerequisite to a refund suit against the collector, that the importer submit a protest in writing at the time of paying the duties. Act of Feb. 26, 1845, ch. 22, 5 Stat. 727; *see Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126–27 (1868).

The "final and conclusive" clause that is at the heart of this case first appeared in section 14 of the Tariff Act of 1864, ch. 171, 13 Stat. 202, 214–15, which is a direct predecessor of the current section 1514. The 1864 statute provided that on the entry of any goods, the decision of the collector of customs as to the rate and amount of duties to be paid would become "final and conclusive against all persons interested therein" unless the importer or other interested party gave notice in writing of its dissatisfaction with the collector's decision within 10 days, followed by an appeal to the Secretary of the Treasury and a suit in court against the collector.

IC&S argues that this background demonstrates that the protest requirement originated and was intended to apply only as a condition to a suit brought by an importer or other interested party to recover overpayments of duties, and that it was not meant to foreclose any party from defending against a claim for additional duties brought by the United States. While it is true that the legislation does not refer to enforcement suits brought by the United States, a number of cases decided shortly after the enactment of the 1864 Act applied the "final and conclusive" clause to government enforcement actions. *See, e.g., Westray v. United States*, 85 U.S. (18 Wall.) 322, 329–30 (1873); *United States v. Schlesinger*, 14 F. 682, 685 (C.C.D. Mass. 1882), *aff'd*, 120 U.S. 109 (1887); *Chase v. United States*, 9 F. 882, 883 (C.C.D. Mass. 1882), *aff'g United States v. Chase*, 25 F. Cas. 410, 411–12 (D. Mass. 1879) (No. 14,787); *United States v. Phelps*, 27 F. Cas. 521, 522–23 (C.C.S.D.N.Y.

1879) (No. 16,039), *aff'd*, 107 U.S. 320 (1882); *Watt v. United States*, 29 F. Cas. 441, 442 (CC. S.D.N.Y. 1878) (No. 17,292); *United States v. Cobb*, 11 F. 76, 79 (C.C.D. Mass. 1882); *United States v. McDowell*, 21 F. 563, 565–66 (S.D.N.Y. 1884); *United States v. Earnshaw*, 12 F. 283, 285–86 (S.D.N.Y. 1882); *United States v. Campbell*, 10 F. 816, 819 (S.D.N.Y. 1882); *United States v. Comarota*, 2 F. 145, 146–47 (S.D.N.Y. 1880); *United States v. Sowers*, 27 F. Cas. 1276, 1277 (E.D. Pa. 1879) (No. 16,363); *United States v. Cousinery*, 25 F. Cas. 677, 677–78 (S.D.N.Y. 1874) (No.14,878).

In many of those cases, the courts explicitly addressed the question whether the "final and conclusive" clause was applicable in the context of enforcement actions, and they uniformly held that it was. In the *Cousinery* case, for example, Judge (later, Justice) Blatchford analyzed in detail and rejected precisely the claim that IC&S is now making, a century and a quarter later:

> It is contended, for the defendants, that [section 14 of the 1864 Act] has relation only to duties which have been paid; that its sole object is to regulate suits to recover back such duties after they have been paid; that it has no application to a suit by the United States to recover unpaid duties * * *. But this view ignores the actual structure of the section and the plain meaning of its language. It enacts that the decision of the collector shall be final and conclusive against all persons interested therein, unless the notice of dissatisfaction is given and the appeal is taken. * * * This entirely excludes from consideration in a suit brought by the United States to enforce payment of the duties, all questions as to whether the decision of the collector or that of the secretary was correct.

25 F. Cas. at 678.

Chief Justice Waite, sitting in the circuit court in the *Watt* case, conducted essentially the same analysis and reached the same conclusion:

> The language of the statute is clear and explicit, to the effect, that the decision of the collector shall be final and conclusive against all persons interested, as to the rate and amount of duties to be paid, unless the appeal is taken. No room is left for construction. The provision is not that no suit shall be maintained to recover back money paid under the decision, until the appeal is taken and acted upon, or the specified time for such action has elapsed, but that the decision itself shall be final and conclusive against all persons interested, upon the questions necessarily decided.

29 F. Cas. at 443.

By the end of the 1880s, as demonstrated by the unbroken line of court decisions cited above, it was well established that the "final and conclusive" clause of section 14 of the 1864 Act applied both to suits brought by private parties seeking refunds of duty overpayments and to government enforcement actions brought to recover underpayments of duties.

In 1890, Congress again revised the tariff statutes. As part of the overhaul, Congress gave importers a right to judicial review of their refund

requests in the circuit court, rather than through an action against the collector of customs. In Section 14 of the new statute, however, Congress preserved the protest requirement and the "final and conclusive" clause in language similar in all material respects to that found in section 14 of the 1864 Act. *See* Act of June 10, 1890, ch. 407, 26 Stat. 131, 137–38. The courts construing the 1890 statute again uniformly held that the protest requirement and the "final and conclusive" clause applied not only to refund requests by importers, but also to government enforcement actions against importers for the collection of duties. *See, e.g., United States v. Mexican Int'l R.R. Co.*, 151 F. 545, 548 (5th Cir. 1907); *United States v. Tiffany & Co.*, 151 F. 473, 474 (2d Cir. 1906); *Louisville Pillow Co. v. United States*, 144 F. 386, 388 (6th Cir. 1906); *Gandolfi v. United States*, 74 F. 549, 550 (2d Cir. 1896); *United States v. Strauss*, 55 F. 388, 390 (S.D. Ohio 1893).

In its briefs, IC&S ignores this entire line of authority. Instead, IC&S relies on the Supreme Court's subsequent decision in *United States v. Sherman & Sons Co.*, 237 U.S. 146 (1915), as its basis for arguing that under section 14 of the 1890 Act, as amended in 1909, the "final and conclusive" clause did not apply to government enforcement actions. But the *Sherman* case does not stand for that broad proposition, as a close examination of the decision reveals.

Section 14 of the 1890 Act, as amended, provided that after the passage of one year, absent fraud and absent a protest by the importer, a decision of the collector of customs as to the rate and amount of duties owed on imported goods would become final and conclusive on all parties. *Sherman* presented the Supreme Court with the question whether a customs collector could make a determination of fraud and then reliquidate an entry more than one year after the original liquidation, and whether an importer who failed to file a timely protest of the reliquidation could challenge the reliquidation in a subsequent government enforcement action. *See* 237 U.S. at 149–50.

After noting the general principle that a protest must be filed in order to challenge any liquidation or reliquidation, 237 U.S. at 151–52, the Supreme Court held that principle inapplicable to the two actions before it. The Court explained that while the customs laws made an unprotested liquidation final and conclusive, Congress did not "authorize the Collector to make findings of fraud" and compel the importer to defend against the fraud determination through the protest mechanism. *Id.* at 155. Instead, the Court held, a charge of fraud must be proved in court, and not simply through the administrative process. *Id.* at 157. For that reason, the Court concluded, an importer who is subjected to a reliquidation based on a charge of fraud is not relegated to the protest and appeal mechanism, but may challenge the finding of fraud in a government enforcement action brought in court even if the importer filed no protest of the reliquidation. *See id.* at 158.

In the first of the two actions under review in *Sherman*, the customs collector had not specifically alleged fraud in his complaint, although

the reliquidation was made more than a year after the original liquidation (and thus the action would be sustainable only if based on a showing of fraud). Although the Court did not discuss the first action separately, it answered the certified question pertaining to that action by stating that the importer was "not concluded by the reliquidation order" and was entitled to defend against a government enforcement action based on the liquidation "even though he did not file a protest and make the payment required in the case of the original liquidation." 237 U.S. at 158.

Sherman thus stands for two propositions. First, the Court held that in the case of a reliquidation based on a charge of fraud, the government must allege and prove fraud in court, and the collector's finding of fraud would not be conclusive even if the importer failed to protest the liquidation. Second, the Court held that, even absent a protest, an importer could defend against an enforcement action based on a reliquidation made after the expiration of the one-year statutory period for reliquidations, regardless of whether fraud was specifically alleged as the basis for the reliquidation. *Sherman* does not, however, stand for the much broader proposition that IC&S tries to draw from it, *i.e.* that the protest requirement does not apply to any government enforcement actions.

Any doubt as to the limited reach of the Court's ruling in *Sherman* is dispelled by an examination of the briefs in that case. The government's brief asserted as a basic premise of its argument that the protest requirement is generally applicable to actions brought by the government. Appellant's Brief at 14, *United States v. Sherman & Sons Co.*, 237 U.S. 146 (1915) (No. 541). The importer did not vigorously contest that general proposition. Instead, after briefly noting that there was "some conflict of authority" as to whether the protest requirement applied to government actions, the importer turned to the main issue in the case, which was whether the "final and conclusive" clause barred the importer from contesting the government's allegations of fraud, raised years after the initial liquidation. Appellee's Brief at 20, *United States v. Sherman & Sons Co.*, 237 U.S. 146 (1915) (No. 541). Moreover, the importer cited only a single case, *United States v. Schlesinger*, 120 U.S. 109 (1887), for the proposition that there was "some conflict of authority" as to the applicability of the protest requirement to government enforcement actions. *Schlesinger*, however, was a case in which the importer filed a protest but was barred by a then-applicable provision of the statute from further pursuing the protest by filing a lawsuit challenging the liquidation; it did not suggest that importers could routinely bypass the protest requirement but still raise their defenses in government enforcement actions. The briefs in *Sherman* thus confirm that the Court was not being asked to decide the broad question that IC&S considers to have been resolved by the Court in that case.

Since *Sherman*, the question whether the protest requirement of section 14 of the 1890 Act (or its direct successor, section 514 of the Tariff Act of 1930) applies in government enforcement actions has not been

the subject of many judicial decisions, but those cases that have addressed the question have uniformly treated the protest requirement as applicable to government enforcement actions. *See A.S. Rosenthal Co. United States,* 24 F.2d 351, 352 (2d Cir. 1928); *United States v. Desiree Int'l U.S.A., Ltd.* 497 F. Supp. 264, 266 (S.D.N.Y. 1980); *United States v. Ataka Am. Inc.,* 826 F. Supp. 495, 503 (Ct. Int'l Trade 1993).

The historical background of section 1514 is thus not at all as painted by IC&S. In its briefs and argument, IC&S characterizes the predecessors of section 1514 as directed solely at establishing an administrative prerequisite for a refund suit against the government, and it attacks the government's position in this case as an effort to extend the statute to a context for which it was never designed. Our examination of the historical materials, however, leads us to the contrary conclusion. As indicated above, by the time of the Tariff Act of 1930, it was well established that the exhaustion requirement applied both to refund suits by importers and to enforcement actions by the government. We therefore reject IC&S's contention that the decision of the trial court in this case flies in the face of more than a century of congressional action and judicial practice under section 1514 and its predecessors.

B

Although this court has not specifically addressed the point pressed by IC&S, two of this court's decisions, *United States v. Utex International, Inc.,* 857 F.2d 1408 (Fed. Cir. 1988), and *St. Paul Fire & Marine Insurance Co. v. United States,* 959 F.2d 960 (Fed. Cir. 1992), bear on the question. IC&S claims that each of those decisions buttresses its argument here, but in fact neither decision supports IC&S.

In *Utex,* this court addressed the question whether, in an action for liquidated damages brought by the government, the importer or its surety was required to file a protest and pay the demanded damages in order to preserve the right to defend on the issue of liability. In that context, the court held, a protest was not necessary. While so holding, however, the court indicated no doubt that a protest would have been required if the question before it had been whether the importer or its surety could challenge the validity of a liquidation in an enforcement action. The *Utex* court explained that "[t]he cases cited by the government referring to the finality of assessment absent a timely protest all refer to duties and related exactions subsumed in final liquidation." 857 F.2d at 1414. With respect to that situation, the court stated that it "entirely agree[d] * * * that both sides of this action are now barred from challenging the liquidation." *Id.* Thus, had the issue in the Utex enforcement action been the accuracy or validity of a liquidation, the court presumably would have barred Utex from challenging the liquidation because of its failure to file an administrative protest. *See United States v. Toshoku Am., Inc.,* 879 F.2d 815, 818 (Fed. Cir. 1989) (confirming that the court in *Utex* held a protest unnecessary only because the case involved a claim for liquidated damages based on the importer's alleged non-compliance with the conditions of its bond); *United States v. Ataka*

Am., Inc., 826 F. Supp. at 502–03 (same). For that reason, the quoted language from *Utex*, while not strictly part of the court's holding, is nonetheless squarely at odds with IC&S's principal contention in this case.

In *St. Paul*, the other decision of this court relied on by IC&S, a surety filed a timely protest of a liquidation and filed suit in the Court of International Trade to contest the liquidation. The surety subsequently learned that Customs was investigating the surety's principal for fraud. The surety then sought to amend its complaint to request nullification of its bond on the ground that the government had breached its duties to the surety by failing to inform the surety of the ongoing fraud investigation of the importer and by failing to demand the deposit of full duties by the importer at the time of entry. The government argued that the complaint could not be amended, because the surety had not filed a timely protest presenting the issues that it sought to raise in its amended complaint. The court rejected that argument and held that the surety's contractual defenses at issue in that case could be raised without the need for a protest, regardless of whether the liquidation had been otherwise protested. 959 F.2d at 964. The decision in *St. Paul*, however, does not stand for the much broader proposition that an unprotested liquidation is not final for purposes of a government enforcement action, nor for the equally sweeping proposition that a surety is not bound by unprotested liquidations. It is fair to say, then, that nothing in any of the case law that IC&S has cited to us, or that we have discovered, supports IC&S's contention that the protest requirement of section 1514 does not apply in the context of government enforcement actions. To the contrary, the case law, though sparse in recent years, uniformly supports the position taken by the government on the broad question of the applicability of section 1514 to suits brought by the government.

C

Just as the case law has been consistent on this point, there has been no recent change in the text of the tariff statutes or other indication from Congress signaling an intention to depart from the principle established under the 1864 and 1890 Acts—that the protest requirement applies both to suits brought by importers and to enforcement actions brought by the government. The only direct reference to that issue in any of the legislative materials that the parties have called to our attention is found in the legislative history of the Customs Courts Act of 1980, Pub. L. 96–417, 94 Stat. 1727. The House Committee that reported on that legislation explained that it did "not intend for importers to withhold payment of their assessed duties and then await suit by the Government in order to challenge the underlying administrative decision by the Customs official as to classification or valuation through the use of a counterclaim pursuant to proposed section 1583 [which gave the Court of International Trade jurisdiction over counterclaims, cross-claims, and third-party actions in cases otherwise properly before the court]." H.R. Rep. No. 96–1235, at 49 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3760.

Seizing on the reference to "counterclaims," IC&S argues that the language in the House report was intended only to bar the use of counterclaims to assert claims that were not properly raised through the protest mechanism. In fact, however, the excerpt from the House report indicates that the committee considered the exhaustion of administrative remedies to be a normal prerequisite to challenging a liquidation, even in a government enforcement action, and that the committee wanted to ensure that the new provision allowing parties to raise counterclaims in actions before the Court of International Trade would not be used as a vehicle for sidestepping the traditional protest requirement. *See also Customs Courts Act of 1980: Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong. 221 (1980) (statement of the Association of the Customs Bar suggesting that under the new statute an importer should be allowed to "defend a collection suit on the merits, *provided he had exhausted his administrative remedies.*") (emphasis added).

IC&S argues that section 1514 was designed as an exhaustion of administrative remedies provision and that such provisions do no more than bar the party that has not exhausted its remedies from seeking relief in court. An exhaustion requirement, according to IC&S, does not have the further effect of barring the non-exhausting party from defending against an action brought by the government. While exhaustion requirements often have the effect that IC&S describes, that is not uniformly the case, as the effect of any exhaustion requirement is dictated by the language of the particular statute in which that requirement resides.

Language nearly identical to that in section 1514 is contained in the Wunderlich Act, 41 U.S.C. § 321, which provides that a contracting officer's decision "shall be final and conclusive" except in certain limited circumstances. Contractors in cases arising under that statute have argued that the "final and conclusive" language was limited to barring private parties from seeking affirmative relief and did not have the effect of foreclosing defenses in enforcement actions brought by the government. The courts, however, have rejected that argument, holding that the term "final and conclusive" in the statute must be interpreted to bar challenges to the decision in question whether raised in an affirmative suit or through a defense in an enforcement action. *See, e.g., United States v. Ulvedal*, 372 F.2d 31, 34–35 (8th Cir. 1967) (Blackmun, J.); *United States v. Hammer Contracting Corp.*, 331 F.2d 173, 176 (2d Cir. 1964) (Marshall, J.), *aff'g* 216 F. Supp. 948 (E.D.N.Y. 1963).

The issue of the effect of the "final and conclusive" clause is thus simply one of statutory construction. The language of section 1514, that a liquidation will be "final and conclusive" unless protested, is sufficiently broad that it indicates that Congress meant to foreclose unprotested issues from being raised in any context, not simply to impose a prerequisite to bringing suit. Moreover, we discern no compelling policy consid-

eration counseling against giving the statutory language its naturally broad reading. To the contrary, under IC&S's position importers or sureties could bypass the protest mechanism in any case in which an underpayment of duties is alleged, and then collaterally challenge the liquidation in the ensuing enforcement action. To give importers and sureties that option would create a gaping hole in the administrative exhaustion requirement of section 1514 and would be inconsistent with the underlying policy of section 1514, which is to channel challenges to liquidations through the protest mechanism in the first instance. *See United States v. A.N. Deringer, Inc.*, 593 F.2d 1015, 1021 (CCPA 1979).

Likewise, there is no force to IC&S's claim that the decision of the Court of International Trade deprives an importer or surety of its statutory right to a trial in the Court of International Trade "upon the basis of the record made before the court" in collection actions brought by the government. 28 U.S.C. § 2640(a)(6). Under the 1980 Customs Courts Act, an importer or surety in a collection action is entitled to a trial *de novo*, just as it would have been in a district court before 1980. As we have discussed, however, an importer's or surety's right to a trial *de novo* in a district court in a collection case before 1980 was subject to the protest requirement of section 1514, and the same principle simply carried over to the Court of International Trade. The right to a trial *de novo* on the basis of a record made before the court does not give a party the right to litigate issues that the party has previously waived by failing to comply with statutory procedural requirements. Thus, to apply the protest requirement to all challenges to liquidations does not result in a denial of the right to trial in the collection action if the importer or surety has not filed a timely protest; it merely limits the scope of the issues that can be contested at such a trial. Other issues remain open for trial, as was made clear in the *Utex* and *St. Paul* cases. But the issue of the correctness and validity of the liquidation is "final and conclusive" for purposes of the collection action when the liquidation has not been protested in accordance with the provisions of section 1514. We therefore reject IC&S's principal contention on this appeal—that the protest requirement of section 1514 has no role to play in an enforcement action brought by the government.

III

That does not, however, end this case. At the end of its brief, IC&S raises a second, narrower ground for reversal. Referring to the defenses it asserted in the trial court, IC&S argues that summary judgment should not have been granted in favor of the government, because the entry at issue in this case was "deemed liquidated" by operation of law when the Customs Service failed to liquidate it within one year of the date of entry. *See* 19 U.S.C. § 1504. IC&S contends that it should not have been required to protest the October 28, 1988, liquidation in order to be entitled to argue that Customs was legally foreclosed from liquidating the entry anew after the entry had already been deemed liquidated. The government answers that IC&S's "deemed liquidation"

defense should have been raised through the protest mechanism, and that when IC&S failed to protest the October 28, 1988, liquidation, the "deemed liquidation" defense was waived, along with any other defenses that might have been based on the invalidity or inaccuracy of the October 28 liquidation. We conclude that the "deemed liquidation" issue did not have to be raised through a protest, and that the trial court should have considered that issue on the merits.

As we noted earlier, the Supreme Court in the *Sherman* case held not only that the issue of fraud had to be tried in court, but also that an importer could challenge a reliquidation on the ground of untimeliness without filing an administrative protest. Significantly, the Court did not treat the untimeliness of the reliquidation as simply a matter of defense, such as a defense based on a statute of limitations. Instead, the Court answered the second certified question in the case by holding that because of the untimeliness of the reliquidation, the government's complaint failed to state a cause of action. *See* 237 U.S. at 148, 158. Other early decisions were to the same effect, ruling that a liquidation made after the time for liquidation had expired did not have to be protested, but could be challenged by way of defense in a collection action. *See United States v. Lian* 10 F.2d 41, 42–43 (2d Cir. 1925); *United States v. John A. Heitz, Inc.*, 238 F. 1002, 1003–04 (E.D. Pa. 1917); *United States v. Leng*, 18 F. 15, 18 (S.D.N.Y. 1883); *United States v. Frazer*, 25 F. Cas. 1207, 1207 (S.D.N.Y. 1879) (No. 15,161); *see also Guy B. Barham Co. v. United States*, 35 C.C.P.A. 138, 145 (1948).

Without addressing the pertinent holding of the *Sherman* case, the government relies on a series of cases from this court and its predecessor to support its contention that IC&S was required to protest the October 28, 1988, liquidation in order to preserve its claim that the earlier "deemed liquidation" terminated its liability. While the cases on which the government relies make clear that there is no broad exception to the protest requirement for liquidations that are putatively "void," rather than simply "voidable," we do not read those cases as repudiating the *Sherman* case or otherwise holding that a liquidation of the sort at issue in this case must be protested in order to be challenged in court.

The first of the cases on which the government relies is *United States v. A.N. Deringer, Inc.*, 593 F.2d 1015 (CCPA 1979). In that case, the Customs Service liquidated several entries of food products, but the products were later refused admission by the U.S. Food and Drug Administration. The importer failed to file a timely protest with respect to one of the entries, and the government argued that the importer's objection to the liquidation was therefore waived. The Customs Court held, however, that the failure to file a protest did not bar the importer from challenging the liquidation, because the liquidation was improperly made prior to the FDA's notice of refusal and was therefore void. The Court of Customs and Patent Appeals reversed, noting that section 1514 "contemplates that both the *legality* and correctness of a liquidation be determined, at least initially, via the protest procedure." 593 F.2d at

1020. The court expressly rejected the argument that "voidable" liquidations must be protested, but "void" liquidations do not.

The decision in *Deringer* was followed by this court in *Omni U.S.A., Inc. v. United States,* 840 F.2d 912 (Fed. Cir. 1988), and *Juice Farms, Inc. v. United States,* 68 F.3d 1344 (Fed. Cir. 1995), both of which confirmed that this court does not recognize a distinction between "void" and "voidable" liquidations for purposes of determining the applicability of the protest requirement of section 1514. In the *Omni* case, Customs was supposed to hold the liquidation of the entries in suspense, but instead liquidated the entries prematurely. Notwithstanding the unlawfulness of the liquidations, the court held that the liquidations became final when the importer failed to file a timely protest or make a timely request for reliquidation under 19 U.S.C. § 1520(c). *See* 840 F.2d at 913–15.

The *Juice Farms* case involved similar facts—Customs erroneously liquidated entries while suspension orders were in effect, but the importer failed to file a timely protest or request for reliquidation. Because the importer's protest was untimely, the court held, the liquidations became "final and conclusive" against all parties. 68 F.3d at 1346. The court then declared that "all liquidations, whether legal or not, are subject to the timely protest requirement. Without timely protest, all liquidations become final and conclusive under 19 U.S.C. § 1514." *Id.*

The cases from this court and the Court of Customs and Patent Appeals on which the government relies all dealt with liquidations that were alleged to be invalid because of some flaw in the process leading to their issuance. The problem with the liquidation at issue in this case, however, is of a different character. The asserted flaw in this case is not in the accuracy of the liquidation or the lawfulness of the process leading up to it, but in the effect that the government seeks to give it—the effect of displacing the liquidation that had already taken effect by operation of law pursuant to the "deemed liquidation" statute, 19 U.S.C § 1504(a).

The "deemed liquidated" provision of section 1504 was added to the customs laws in 1978 to place a limit on the period within which importers and sureties would be subject to the prospect of liability for a customs entry. *See St. Paul Fire & Marine Ins. Co. v. United States,* 6 F.3d 763, 767 (Fed. Cir. 1993); *Ambassador Div. of Florsheim Shoe v. United States,* 748 F.2d 1560, 1565 (Fed. Cir. 1984); *Pagoda Trading Co. v. United States,* 617 F. Supp. 96, 99 (Ct. Int'l Trade 1985), *aff'd* 804 F.2d 665 (Fed. Cir. 1986); S. Rep. No. 95–778, at 31–32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2211, 2242–43 ("Under the present law, an importer may learn years after goods have been imported and sold that additional duties are due, or may have deposited more money for estimated duties than are actually due.").

The purpose of section 1504 was to bring finality to the duty assessment process. As the Commissioner of Customs said in his statement to the House committee that reported out the 1978 amendments to the Tariff Act, the provision that became section 1504 was designed to "eliminate unanticipated requests for additional duties coming years af-

ter the original entry." *Customs Procedural Reform Act of 1977: Hearings on H.R. 8149 and H.R. 8222 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 56 (1977) (statement of Robert E. Chasen, Commissioner of Customs). The effect of a "deemed liquidation" is therefore to fix the liability of the importer or surety and, once that liability is discharged, to terminate the government's cause of action for the entry in question. Thus, a "deemed liquidation" under section 1504 has the same effect as the expiration of the time for reliquidation in *Sherman:* it subjects any further collection efforts by the government in connection with the same entry to dismissal for failure to state a claim upon which relief can be granted.

The entry at issue in this case was deemed liquidated on or about September 19, 1988, one year after the entry. No protest was filed nor was any other action taken with respect to that liquidation. Instead, the government simply made a new liquidation a month later, on October 28, 1988, and treated that new liquidation as the operative liquidation for purposes of this case.

The government has suggested to us that its October 28, 1988, liquidation might be treated as a reliquidation, but its complaint alleged no ground for reliquidation at that time, and the government has not identified any such ground that is available to it in this case. The government has not suggested the presence of fraud in this case, which might have justified a reliquidation under former 19 U.S.C. § 1521 (1988); reliquidation would not be available under 19 U.S.C. § 1520(c), since that authority is limited to errors "adverse to the importer"; and reliquidation under 19 U.S.C. § 1501 would not be permitted because that provision applies only to liquidations made in accordance with 19 U.S.C. § 1500, and not to "deemed liquidations" under 19 U.S.C. § 1504. The "deemed liquidation" must therefore be regarded as final.

In cases in which a liquidation has become final, the government cannot seek to recover additional duties simply by making a new liquidation of the original entry. Regardless of the accuracy or procedural correctness of the new liquidation, it would have no legal effect, because it would be barred by principles of res judicata. In that and other analogous settings, the liquidation simply does not have the capacity to give rise to liability. For example, even if a liquidation were obtained through unimpeachable procedures and stated the correct duty, it would not result in the imposition of liability on a person who had nothing whatsoever to do with the entry but was mistakenly identified as the importer or surety. Such a party would challenge the liquidation not for its validity or accuracy, but because the liquidation could not have any legal effect on that party's rights. As the government acknowledged at oral argument, a party under those circumstances would not have to protest the liquidation in order to avoid being subjected to a binding liability for the claimed duties. Because the liquidation could not create a legal liability for the uninvolved party, that party should not be required to shoulder

the burden of initiating a protest and tendering the asserted underpayment of duties.

IC&S's challenge to the October 28 liquidation is of the same character as those discussed above, and thus is distinguishable from the challenges to the liquidations at issue in *Deringer, Omni,* and *Juice Farms.* IC&S is not contending that the liquidation is procedurally or factually flawed, but is asserting that it has no legal effect in the circumstances of this case and therefore cannot serve as the basis for the imposition of liability. For that reason, this case fits within the rule of *Sherman* rather than the principles of *Deringer, Omni,* and *Juice Farms.*

If an importer or surety were invariably required to protest a liquidation in order to preserve the right to challenge it, the opportunities for abuse would be manifest. Under the government's proposed construction of section 1514, there would be nothing, in theory, that would prevent Customs from conducting multiple successive liquidations of the same entry and requiring the importer or surety to assume the burdens of protesting each one. Likewise, Customs could purport to liquidate an entry anew, years after the first liquidation had become final, and thereby impose liability on the importer or surety if the importer or surety were not vigilant in watching for notice of such untimely liquidations or if it were no longer able to undertake the burden of filing and pursuing a protest.

The potential for abuse from a rule requiring protests in such cases is sufficiently plain that we think it unlikely that Congress would have intended the protest requirement to apply so broadly. Rather, we discern the principle of *Sherman,* unaffected by subsequent legislation, to be that once the government's cause of action expires, Customs cannot breathe new life into it merely by liquidating the entry anew. We therefore hold that because Cherry Hill's entry was liquidated by operation of law prior to the October 28, 1988, liquidation, IC&S was not required to protest the October 28 liquidation in order to be entitled to defend against liability on the ground of the deemed liquidation. Accordingly, the government was not entitled to summary judgment in its favor on the ground that IC&S failed to protest the October 28 liquidation. Although there does not appear to be any dispute over facts material to the issue of liability in this case, we leave it to the trial court to determine whether IC&S is entitled to judgment in its favor on the government's complaint.

Each party shall bear its own costs for this appeal.

REVERSED AND REMANDED.

IKO INDUSTRIES, LTD, PLAINTIFF-APPELLEE *v.*
UNITED STATES DEFENDANT-APPELLANT

Appeal No. 96–1111

(Decided January 22, 1997)

James Caffentzis, Fitch, King and Caffentzis, of New York, New York, argued for plaintiff-appellee.

John J. Mahon, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director, of Washington, D.C., and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, of New York, New York. Of counsel on the brief was *Edward N. Maurer*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of New York, New York.

Appealed from: United States Court of International Trade.
Chief Judge CARMEN.

Before ARCHER, *Chief Judge*, SMITH, Senior *Circuit Judge*, and MICHEL, *Circuit Judge*.

Opinion for the court filed by *Circuit Judge* MICHEL. Dissenting opinion filed by *Senior Circuit Judge* SMITH.

MICHEL, *Circuit Judge*.

The United States ("the government") appeals the September 19, 1995 decision of the United States Court of International Trade, Slip op. 95–161, granting summary judgment to IKO Industries, Ltd. ("IKO") and holding that IKO had overcome the presumption of correctness attached to the United States Customs Service's ("Customs") classification of the subject merchandise under subheadings 6807.10.00 and 6807.90.00 of the Harmonized Tariff Schedule of the United States ("HTSUS") and had proven that the subject merchandise was properly classified under subheading 4811.10.00, HTSUS. Because the Explanatory Notes to Chapter 68 specifically exclude asphalted paper and because the subject merchandise, other than the Armour Lock shingles, is more specifically described by Heading 4811, HTSUS, than Heading 6807, HTSUS, we affirm-in-part. However, because IKO's Armour Lock shingles are not rectangular and therefore cannot fall within the description of Heading 4811, we vacate-in-part.

BACKGROUND

IKO imports two types of products: three varieties of paper-based, asphalt roll roofing and ten varieties of paper-based, asphalt shingles. With the exception of the Armour Lock shingle, the shingles are all rectangular. Both the roll roofing and the shingles are used as an exterior cover for roofs to protect the roofs against water damage and other environmental effects.

Customs classified the roll roofing as "Articles of asphalt or of similar material (for example, petroleum bitumen or coal tar pitch): In rolls

* * *" under 6807.10.00, HTSUS and the shingles as "Articles of asphalt or of similar material (for example, petroleum bitumen or coal tar pitch): Other * * *" under 6807.90.00, HTSUS. On April 18, 1991, IKO filed a timely formal protest contending that the roll roofing and the shingles should be categorized as "Paper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or sheets, other than goods of heading 4803, 4809, 4810, or 4818:[1] Tarred, bituminized or asphalted paper and paperboard * * *" under 4811.10.00, HTSUS. The protest was denied by Customs on May 1, 1991.

IKO timely filed suit in the Court of International Trade. The parties filed a joint stipulation of facts and requested that the action be submitted for decision on stipulation in lieu of trial. The Court of International Trade treated the motion as one for summary judgment. In reaching its decision, the Court of International Trade noted that, at first glance, the term "articles of asphalt" may appear to encompass the roll roofing and shingles, but that the products were more specifically described as "asphalted paper and paperboard," as the parties agreed that the products were "paper-based." Noting that General Rule of Interpretation 3 provides that headings with the most specific description shall be preferred to headings providing a more general description, the trial court found that subheading 4811.10.00 more specifically described the merchandise. The Court of International Trade further relied on General Rule of Interpretation 1, which provides that classification shall be determined according to the terms of the headings and any section or chapter notes, and on the fact that note 1(b) of Chapter 68 specifically excludes from Chapter 68 "[c]oated, impregnated or covered paper of heading 4810 or 4811 (for example, paper coated with mica powder or graphite, bituminized or asphalted paper)."

ANALYSIS

I.

We must first address the government's contention that Customs' classification of the roll roofing and shingles as "articles of asphalt" under Heading 6807 is entitled to a statutory presumption of correctness and an appropriate degree of deference. The government cites to *Goodman Manufacturing, L.P. v. United States*, 69 F.3d 505 (Fed. Cir. 1995), in support of its argument. However, as expressly pointed out in *Goodman* and as the government admits, where, as here, there is no factual dispute between the parties, the presumption of correctness is not relevant. 69 F.3d at 508. In cases such as *Goodman*, the issue then becomes whether "Customs's decision is based on a permissible construction of the trade statutes." *Id.* (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). The government thus argues that "[t]he basis for Customs' classification under Heading 6807,

[1] [These headings cover materials such as toilet or facial tissue stock, copying or transfer tissue papers, paper coated with kaolin, and miscellaneous materials including toilet paper, tablecloths and diapers.]

HTSUS, is that when the amount of asphalt coating on a paper substrate is as great as it is on the imported roll roofing and shingles, the articles are properly characterized as articles of asphalt rather than as articles of asphalted paper which is an entirely rational interpretation of the statutory provisions in issue."

The government's reliance on *Goodman* is misplaced. *Goodman* did not involve a classification dispute but rather a dispute regarding the proper valuation of privileged steel transferred from a manufacturer's foreign trade subzone into the domestic market. As the Court of International Trade previously stated:

> The Court also rejects defendant's argument that the Court should uphold Customs' classification because the agency based its classification on a reasonable interpretation of subheading 4010.91.15. Defendant's argument is meritless because it misconstrues the Court's role in Customs classification cases. In such cases, the Court conducts a trial *de novo*. Although Customs' decisions enjoy a presumption of correctness, the Court's duty in reviewing a classification determination "is to find the *correct* result. * * *" Implicit in this function is the Court's responsibility to exercise its own judgment as to what is the proper classification of the merchandise under review.

Semperit Indus. Prods., Inc. v. United States, 855 F. Supp. 1292, 1299 (Ct. Int'l Trade 1994) (citations and footnotes omitted). We therefore review *de novo* the trial court's decision regarding the scope of the various headings at issue here, but review the factual question of whether the imported items are within the scope of the various headings under the clearly erroneous standard. *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995); *see also Trans-Border Customs Serv., Inc. v. United States*, 76 F.3d 354, 357 (Fed. Cir. 1996) ("The Court of International Trade's grant of summary judgment for the Government is based on its interpretation of the Harmonized Tariff Schedule of the United States * * *. This is a question of law which this court reviews anew.") (citation omitted); *Totes, Inc. v. United States*, 69 F.3d 495, 497–98 (Fed. Cir. 1995) ("The meaning of a tariff classification term is also a question of law, which we review *de novo.*"). As the parties have stipulated to the facts in this case and as the only dispute turns on whether the subject merchandise is paper coated with asphalt or an article of asphalt, the issue turns solely upon the proper legal interpretation of the relevant headings, as guided by the general rules of interpretation.

II.

Turning to the merits, we agree with the trial court that all of the subject merchandise, other than the Armour Lock shingles, is properly classified under Heading 4811. HTSUS General Rule of Interpretation 1 provides that classification shall be determined according to the terms of the headings and any relevant section or chapter notes. Heading 4811 refers specifically to paper that has been "coated, impregnated, [or] cov-

ered" and formed into rolls or sheets, whereas Heading 6807 refers generally to "[a]rticles of asphalt or of similar material." Here, the merchandise, which is undisputedly a paper-based product that has been coated and impregnated with asphalt, could conceivably fall under either heading, as admitted by the government.

Chapter Note 1(b) of Chapter 68, however, specifically excludes "[c]oated, impregnated or covered paper of heading No. 48.10 or 48.11 (for example, paper coated with mica powder or graphite, bituminized or asphalted paper)." The question then becomes whether the subject merchandise falls within the definition of asphalted paper. One dictionary defines the term "asphalt paper" as a "paper that is coated or impregnated with asphalt." McGraw-Hill Dictionary of Scientific and Technical Terms 110 (2d ed. 1978). As the parties stipulated that the subject merchandise is paper-based and coated and impregnated with asphalt, this note excludes the subject merchandise from the scope of Heading 6807. Additionally, the Explanatory Note to Heading 6807[2] states that the heading excludes "[p]aper merely coated, impregnated or covered with tar or similar material, intended for use as, for example, wrapping paper (heading 48.11)." While it is true that IKO's products are not intended for use as wrapping paper, the subject merchandise is paper that has been coated and impregnated with asphalt, a material similar to tar. Likewise, while it is true that the Explanatory Notes to Heading 6807 state that the heading includes "[r]oofing boards consisting of a substrate (e.g., of paperboard, of web or fabric of glass fibre, of fabric of man-made fibre or jut, or of aluminum foil) completely enveloped in, or covered on both sides by, a layer of asphalt or similar material," we agree with the Court of International Trade that the term "roofing board" suggests a stiff and rigid material, unlike the subject merchandise. Although we were unable to find a definition of the term "roofing board," the term "board" is used to describe a stiff material. For example, the Oxford English Dictionary defines "board" variously as a "piece of timber sawn thin," a "flat slab of wood fitted for various purposes, indicated either contextually, or by some word prefixed, as *ironing-board, knife-board,* etc.," and a "kind of thick stiff paper." 2 Oxford English Dictionary 338–39 (2d ed. 1989). Thus, the Chapter Notes and Explanatory Notes to Chapter 68 indicate that the scope of Chapter 68 cannot be interpreted broadly enough to cover the subject merchandise.

Moreover, nothing in the notes to Chapter 48 would eliminate the subject merchandise from that chapter. While it is true that Chapter Note 1(l) excludes abrasive paper or paper-backed mica, the government does not allege that the merchandise falls within either of the Headings for such abrasive paper or paper-backed mica. Additionally, although the government argues that at some point so much asphalt is added to the paper to create an article of asphalt rather than paper, Chapter Note 1(f) makes such a distinction but only for paper coated with plastic. Thus,

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[2] Explanatory Notes, while not binding or dispositive, may be instructive. *Marubeni America Corp. v. United States*, 35 F.3d 530, 535 n.3 (Fed. Cir. 1994).

the chapter does not include "one layer of paper or paperboard coated or covered with a layer of plastics, the latter constituting more than half the total thickness." However, the Chapter Notes do not make such a distinction regarding paper coated with asphalt. Although the Explanatory Notes to Chapter 48 provide several examples of coated paper and impregnated paper, none of which specifically include the merchandise at issue, there is no indication that the list of examples is exclusive. Moreover, the examples do include paper coated with asphalt and paper coated with tar. Thus, the headings and notes suggest that the subject merchandise is properly classified under Heading 4811.

Our result is further supported by General Rule of Interpretation 3(a), which provides that, when goods are classifiable under two or more headings, the heading which provides the more specific description is preferred over a heading providing a more general description. *See Medline,* 62 F.3d at 1409 n.1 ("Because Heading 6302 of HTSUS provides the most specific provision for the imported drawsheets and therefore prevails over Heading 6304 and Heading 6307 of HTSUS, we do not address whether the drawsheets could be properly classified under either of these provisions."); *Marubeni,* 35 F.3d at 536 ("If the Pathfinder satisfies the requirements of 8703 HTSUS, there is no need to discuss 8704 HTSUS because under the General Rules of Interpretation (GRI) when an article satisfies the requirements of two provisions, it will be classified under the heading giving a more specific description, here 8703 HTSUS."). Although the trial court erred by apparently comparing a subheading with a heading, any such error was harmless. Here, there can be no real dispute that Heading 4811 is more specific that Heading 6807. Heading 4811 describes not only the type of material (paper, paperboard, etc.) but also the treatment to which the material is exposed (coated, impregnated, covered, etc.) and the shape of the article (rolls or sheets). Heading 6807, on the other hand, describes only the type of material (asphalt or similar material). Thus, the subject merchandise is properly classified under Heading 4811.

Turning to the Armour Lock shingles, the government argues that the trial court's decision regarding the Armour Lock shingles is erroneous even if subheading 4811.10.00 were applicable, because these particular shingles are not rectangular in shape. IKO agrees and has abandoned its claim as to that specific article. We therefore vacate that portion of the trial court's decision.

COSTS

Each party to bear its own costs.

AFFIRMED-IN-PART, VACATED-IN-PART

SMITH, *Senior Circuit Judge,* dissenting.

I respectfully dissent because I disagree with the majority's classification of the shingles and roll roofing at issue under the HTSUS. The ma-

jority finds that the application of GRI 1 to these tariff classifications mandates the classification of products at issue under heading 4811. When the function of the merchandise is considered, it becomes clear that the shingles are properly classified under heading 6807.

Heading 4811 describes paper that has been "coated, impregnated, [or] covered" and formed into rolls or sheets, while 6807 classifies "[a]rticles of asphalt." Chapter Note 1(b) of Chapter 68 specifically excludes "[c]oated, impregnated or covered paper of heading No. 48.10 or 48.11 (for example, * * * asphalted paper)." At first blush, it seems that the products in question could be classified under either heading, so the classification must turn on the definition of "asphalted paper."

There is a point where paper treated with a material can no longer be described as treated paper, and becomes an article whose essence is the treating material. While the majority would classify this merchandise as *paper* coated with asphalt, the products are more accurately described as *articles of asphalt* with a paper substrate. The asphalt provides the product's waterproofing capabilities and the paper, which makes up only 11–13% of the product, merely serves as a carrier for the asphalt. Asphalt is rarely used in its pure form to waterproof roofs—some substrate is typically required. While paper provides this necessary function in the products at issue, it is the asphalt that provides the dominant characteristics of the products.

Therefore, at some point, when paper is no longer a significant component of the product, it must cease to be classified as a paper product. While not binding, the *Explanatory Notes ("Notes")* to heading 6807 also imply the existence of such a "crossover point." The *Notes* state that heading 6807 excludes "[p]aper merely coated, impregnated or covered with tar or similar material, intended for use as, for example, wrapping paper (heading 4811)." By describing materials that are properly classified under heading 4811 as "[p]aper merely coated * * *," the drafters of the *Notes* evidence an intent to classify paper products under 4811 that have not reached the crossover point and taken on the characteristics of the treating materials.

The *Notes* to Chapter 68 further support the government's claim that these products have crossed the line into heading 6807 in contemplating the functionality of the products under the respective sections. While the *Notes* suggest that products properly classifiable under section 4811 include "wrapping papers," the *Notes* to heading 6807 state that that heading includes "[r]oofing boards consisting of a substrate (e.g., of paperboard, of web or fabric of glass fibre, of fabric of man-made fibre or jute, or of aluminum foil) completely enveloped in, or covered on both sides by, a layer of asphalt or similar material." Clearly, the function of the products at issue here is more akin to the function of products properly classifiable under heading 6807 than to "wrapping paper."

The majority does not contend that Chapter 68 can never encompass any asphalted paper felt, but that the *Explanatory Notes* preclude classification of the shingles and roll roofing at issue under heading 6807 be-

cause the term "roofing boards" suggests products that are stiff and structural. The substrates set forth in the *Note* (i.e. paper, fiberglass, jute, aluminum foil) hardly suggest load-bearing potential. Whether rolled or cut into shingles, these products are significantly stiffer than paper, and hence their description as "boards" is not completely inappropriate. Moreover, the majority's argument is inconsistent with their willingness to classify the non-rectangular Armour-Lock shingles under heading 6807, even though they are no more rigid than the other shingles at issue. After this requirement of rigidity is set aside, roof coverings of the type in question here are clearly properly classified under heading 6807.

CONCLUSION

Because the products at issue have "crossed the line" from classification as paper products under heading 4811 to articles of asphalt under heading 6807, application of headings and chapter notes along with the support of the *Explanatory Notes* mandates classification of the products under the latter provision. Therefore, I would reverse the decision of the Court of International Trade and reinstate Customs' original ruling.

KOYO SEIKO CO., LTD., AND KOYO CORP. OF U.S.A, PLAINTIFFS-APPELLANTS *v.* UNITED STATES AND DEPARTMENT OF COMMERCE, DEFENDANTS-APPELLEES, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANTS-APPELLEES

Appeal No. 96–1116

(Decided August 12, 1996)

Neil R. Ellis, Powell, Goldstein, Frazer & Murphy, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief were *Peter O. Suchman, Susan M. Mathews*, and *Lee Ann Alexander*.

Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., argued for defendants-appellees The United States and Department of Commerce. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director. Also on the brief were *Stephen J. Powell*, Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C., *Berniece A. Browne*, Senior Counsel, and *Mark A. Barnett* and *Dean A. Pinkert*, Attorney-Advisors.

James R. Cannon. Jr., Stewart and Stewart, of Washington, D.C., argued for defendants-appellees The Torrington Company and Federal-Mogul Corporation. With him on the brief were *Terence P. Stewart, William A Fennell*, and *Timothy C. Brightbill*.

Appealed from: United States Court of International Trade.
Judge TSOUCALAS.

Before ARCHER, *Chief Judge*, NEWMAN and LOURIE, *Circuit Judges*.

NEWMAN, *Circuit Judge*.

Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., Inc. (together "Koyo") appeal two aspects of the judgment of the Court of Internation-

al Trade[1] sustaining the Final Results of the Department of Commerce, International Trade Administration (Commerce or ITA) second administrative review of the antidumping duty order on certain antifriction roller bearings from Japan. The Court of International Trade sustained Commerce's use of the "best information available" (BIA) rule to calculate the dumping margin for a certain class of bearings; we affirm that decision. However, on the issue of the doubtful debt reserve it was incorrect to treat this accounting procedure differently when calculating home market selling expenses and United States selling expenses. This aspect of the court's decision is reversed.

DISCUSSION

The antidumping law provides that when Commerce determines that a class or kind of foreign merchandise is being sold in the United States at less than fair value, and the International Trade Commission determines that a United States industry is materially injured or threatened with material injury by imports of that merchandise, Commerce must publish an antidumping duty order and the Customs Service must assess an antidumping duty equal to the difference between the foreign market value and the United States price. 19 U.S.C. §§ 1673d and 1673e.[2] Commerce must, upon request, periodically review and redetermine the antidumping duty. 19 U.S.C. § 1675(a).

On May 15, 1989, Commerce published antidumping duty orders for certain antifriction roller bearings from Japan. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan*, 54 Fed. Reg. 20,904 (Dep't Comm. 1989). This appeal relates to the second administrative review, *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 57 Fed. Reg. 28,360 (Dep't Comm. 1992) (final results of antidumping duty administrative reviews), amended, 57 Fed. Reg. 59,080 (Dep't Comm. 1992). Koyo appealed certain aspects of the review results to the Court of International Trade. The court sustained Commerce's determinations, and this appeal followed.

The Court of International Trade must sustain any determination, finding or conclusion found by Commerce on review of determinations on the record unless it is unsupported by substantial evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Zenith Elec. Corp. v. United States*, 77 F.3d 426, 430 (Fed. Cir. 1996) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We review a decision of the Court of International Trade to decide, applying the statutory stan-

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[1] *Koyo Seiko Co. v. United States*, No. 92-07-00505, 1995 WL 495973 (Ct. Int'l Trade Aug. 16, 1995).

[2] Effective January 1, 1995, the Uruguay Round Amendments Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809, amended the antidumping law in a number of respects. The URAA does not apply to administrative reviews initiated before January 1, 1995. Citations are to the antidumping law before these amendments.

dard, whether Commerce's determinations should be sustained. *NEC Home Elec., Ltd. v. United States*, 54 F.3d 736, 742 (Fed. Cir. 1995). Thus we review the findings and conclusions of the agency for evidentiary support and for compliance with law. *Id.*

I

THE BEST INFORMATION AVAILABLE

Koyo states that Commerce unlawfully applied its BIA rule in calculating the dumping margin for one model of antifriction bearings. Use of the BIA, when actual data are not available, is authorized in 19 U.S.C. § 1677e(c):

> In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

See Rhone-Poulenc, Inc. v. United States, 899 F.2d 1185, 1190–91 (Fed. Cir. 1990) (the burden of production is fairly placed on the importer).

A

Koyo correctly states that unless the requisite information has been fairly requested, it is inappropriate to take recourse to secondary evidence such as the best information that can be gleaned from other sources. *See Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572–75 (Fed. Cir. 1990) (the BIA rule can not be used for data not requested). Koyo states that Commerce never requested cost data for the bearings here at issue.

Koyo points to certain apparently conflicting instructions, and fairly extensive correspondence and negotiations. However, it is sufficiently clear that Commerce requested from Koyo cost data for all bearings that continued to be subject to the antidumping duty order after use to make finished products in the United States. Koyo appears to have understood what was needed, for in a December 23, 1991 letter to Commerce Koyo stated:

> Koyo's situation regarding these sales in the United States is very complex. Indeed, our response to the request for information in the questionnaire regarding these sales has been delayed because of this complexity, as well as the difficulty in obtaining resale information regarding the non-scope merchandise from U.S. companies whose relationships with Koyo are extremely tenuous.

Koyo eventually stated that it was unable to obtain this resale information from a United States affiliated company. Although Koyo continues to argue that it was not asked to provide the particular information here at issue, there is substantial evidence supporting the contrary finding by Commerce. When Koyo failed to supply the requested data for its affiliated company, Commerce was required to use the best information available.

B

Koyo also contends that even if Commerce were found to have requested the data for these bearings, Commerce improperly and unfairly applied the BIA rule. According to Koyo, Commerce applied the "Roller Chain rule" too rigidly, thus preventing these bearings from being excluded from the antidumping duty order. The so-called Roller Chain rule is a *de minimis* exception to the requirement that dumping margins be computed for all United States imports at less than fair value. The rule is named for the ruling that implemented congressional intent that an antidumping duty be assessed only when significant amounts of imported merchandise are used in further manufacture or assembly before sale to unrelated purchasers. *See Roller Chain, Other Than Bicycle, From Japan,* 48 Fed. Reg. 51,801 (Dep't Comm. 1983) (the entered value of the imported merchandise must be a significant part of the sales value of the finished merchandise in order to incur antidumping duty); H.R. Rep. 571, 93d Cong., 2d Sess. 70 (1973) (expressing congressional intent).

The Roller Chain rule applies only to imported goods that are not resold as imported but are incorporated into finished products in the United States, and the first sale to an unrelated person is of the finished product. To be excluded from the antidumping duty order, the entered value of the merchandise must be an insignificant portion of the value of the finished product when sold to unrelated customers in the United States. Commerce established a one percent threshold for determining significance. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany et al.,* 54 Fed. Reg. 18992, 19090 (Dept Comm. 1989).

Commerce applied the one percent threshold in the first antifriction bearing administrative review, although it had initially proposed (but not used) a five percent threshold for that proceeding. Considerable deference is due to Commerce's reasonable statutory interpretation and its application. *See Zenith Elec.,* 77 F.3d at 430 (Commerce was assigned broad discretionary authority in administering the antidumping statutes). With appropriate deference to the discretionary authority of the agency charged with administering the statute, the choice of the one percent figure is not unreasonable.

The bearings at issue comprise slightly more than one percent of the sales value of the finished product. Although Koyo argues that these bearings should be excluded from antidumping duty because they only slightly exceed the one percent threshold, Commerce did not abuse its discretion in applying its rule rigorously.

C

Koyo also argues that Commerce did not reasonably apply the statutory definition of "exporter," as used in 19 U.S.C. § 1677a(e)(3), in requiring that Koyo obtain cost data from a United States affiliate "for

whose account the merchandise is imported." Commerce applied the definition of "exporter" in 19 U.S.C. § 1677(13)(D):

> **(13) Exporter.**—[the term includes]—
> (D) any person or persons [who] own or control in the aggregate 20 percent of more of the voting power or control in the business carried on by the person for whom or for whose account the merchandise is imported into the United States, and also 20 percent or more of such power or control in the business of the exporter, manufacturer, or producer.

Commerce determined, and it is not disputed, that this Koyo affiliate met this criterion. Koyo states that its relationship with this importing affiliate is too distant for Koyo to have the leverage needed to obtain the cost data required by 19 U.S.C. § 1677a. However, the manufacturer of the finished product is in the best position to supply the information needed by Commerce in determining the relative value of the dumped component in the finished product. *See Zenith Elec. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cr. 1993). The burden of production is appropriately placed on the party deemed to control the information. Because Koyo's affiliated company came within the 20% ownership or control test, Commerce reasonably looked to Koyo to supply the data. This was neither an abuse of discretion, nor a violation of law. When Commerce did not receive the needed data it lawfully applied the BIA rule, as authorized by 19 U.S.C. § 1677e(c).

D

Koyo argues that the BIA rate used by Commerce was unnecessarily high, thus punishing Koyo for its inability to obtain the requested data. Commerce applied a 73.55% dumping margin based on the best information available. Koyo states that a lower, weighted average margin was calculated during the review.

Commerce applied its two-tier methodology for determining and applying the BIA rule. For importers that refuse to cooperate with the agency's investigation Commerce uses the first-tier rate, which is the highest dumping margin calculated for any party in the less than fair value (LTFV) investigation of the merchandise, or calculated in any administrative review. The second-tier rate is used when an importer cooperates but nonetheless fails to provide requested information. The second-tier rate is the higher of (1) the LTFV rate for the merchandise or (2) the highest calculated dumping margin during the review at issue for the same class or kind of merchandise from the same country. Here, Commerce applied the second-tier rate of 73.55% because while Koyo cooperated with the agency, Koyo's LTFV rate was higher than the dumping margin calculated in the review. This two-tier system has been sustained as "a reasonable and permissible exercise of the ITA's statutory authority to use the best information available when a respondent refuses or is unable to provide requested information." *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1192 (Fed. Cir. 1993). Commerce's imposition of the second-tier BIA rate met these criteria.

The Court of International Trade's decision sustaining the application of the BIA rule, and the imposition of antidumping duty at the rate of 73.55%, is affirmed.

II

THE DOUBTFUL DEBT RESERVE

Commerce did not allow Koyo's doubtful debt reserve as a home market indirect selling expense, *see* 19 C.F.R. § 353.56(b) (offset of indirect selling expense to exporter's sales price), on the ground that it was not actual bad debt but simply a reserve account. Koyo challenges this decision, arguing that if the doubtful debt account is not allowed as a home market indirect selling expense, the analogous reserve must be excluded from the United States indirect selling expense in order to achieve the requisite fair comparison of home market and United States prices. The Court of International Trade sustained Commerce's treatment of the home market doubtful debt reserve, without commenting on Koyo's argument that Commerce failed to treat the two markets in a consistent manner.

The government and The Torrington Company state that Koyo did not adequately raise these arguments administratively. However, Koyo plainly and vigorously raised with Commerce its objection to the exclusion of its doubtful debt reserve in calculating home market selling expenses, and argued that these identical accounts in both markets should be given the same accounting treatment. Koyo's answers to the ITA questionnaire placed on the record the doubtful debt allowances for the home and United States markets. Although Koyo's challenge was directed to Commerce's removal of the reserve from home market selling expenses, Koyo's argument was based on Commerce's continued deduction of this reserve in calculating the United States sales value.

Commerce bears the obligation to make a "fair value comparison on a fair basis." *Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). The comparison is not fair unless comparable items are treated comparably. *See Torrington Co. v. United States*, 68 F.3d 1347, 1352–53 (Fed. Cir. 1995) (the statute and regulations require "adjustments to the base value of both foreign market value and United States price to permit comparison of the two prices at a similar point in the chain of commerce"). Commerce exceeded its authority in changing its accounting rule for home market indirect selling expenses without making a comparable adjustment in the United States calculation.

Commerce itself took the position put forward by Koyo, in subsequent administrative review of the comparative market values of antifriction bearings. Referring to its obligation to make a fair value comparison, in 1995 the agency stated: "Because we do not consider Koyo's doubiful debt reserve to be an actual [home market] selling expense, we agree in principle with Koyo that doubtful debt reserves should not be treated as U.S. selling expenses either." *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan,*

Romania, Singapore, Sweden, Thailand, and the United Kingdom, 60 Fed. Reg. 10,900 (Dep't Comm. 1995) (final results fourth administrative review).

Parallel treatment of the doubtful debt reserves was improperly withheld for the review here at issue. It is not disputed that the two reserve accounts are equivalent of purpose and are directly comparable. Both should be included in the respective calculations of indirect selling expenses, or both excluded. *Smith-Corona*, 713 F.2d at 1578.

We reverse the decision that had sustained disparate accounting treatment of the doubtful debt reserve in the home market and the United States market. This issue is remanded for appropriate further proceedings.

AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED

UNITED STATES, PLAINTIFF-APPELLEE *v.*
JAC NATORI CO., LTD., DEFENDANT-APPELLANT

Appeal No. 96–1118

(Decided February 13, 1997)

Thomas J. Kovarcik, of Irving A. Mandel, Counselor at Law, of New York, New York, argued for defendant-appellant. With him on the brief were *Irving A. Mandel* and *Jeffrey H. Pfeffer*.

John K. Lapiana, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., argued for plaintiff-appellee. With him on. the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director.

Appealed from: United States Court of International Trade.
Judge AQUILINO.

Before RICH, SCHALL, and BRYSON, *Circuit Judges*.

BRYSON, *Circuit Judge*.

In 1990, the government filed a complaint in the Court of International Trade against Jac Natori Co., Ltd., an importer. The complaint sought to recover penalties based on allegedly inaccurate entry forms filed with a shipment of goods in 1985, penalties based on fraud in connection with entries in 1981 and 1982, and unpaid duties resulting from the 1981 and 1982 entries. After trial, the Court of International Trade awarded the government penalties for the 1985 entry and unpaid duties for the 1981 and 1982 entries. Natori appeals from the award of unpaid duties for 1981 and 1982, arguing that the collection of duties is barred by the statute of limitations and that the government failed to prove its entitlement to unpaid duties for those entries. We affirm-in-part, vacate-in-part, and remand for further proceedings.

I

During the period at issue in this case, Natori imported wearing apparel from a Philippines-based manufacturer known as FFI. In 1985, the Customs Service discovered significant discrepancies between Natori's entry forms and the contents of a particular shipment from FFI to Natori. The Customs inspector found that most of the boxes in the shipment contained more merchandise than was declared on the entry forms. After that discovery, Customs audited Natori's accounting records for 1981 and 1982. As a result of the audit, Customs concluded that numerous consumption entries presented by Natori during 1981 and 1982 understated the dutiable value of merchandise Natori received from FFI.

On August 30, 1990, the government commenced an action against Natori in the Court of International Trade. The first two counts of the complaint sought alternative penalties under 19 U.S.C. § 1592(c)(2) and (c)(3) in the amount of either $32,859.04 (for gross negligence) or $16,429.52 (for negligence) for underreporting the value of the merchandise in the 1985 shipment. Count 3 of the complaint alleged that Natori fraudulently understated the value of merchandise imported during 1981 and 1982, in violation of 19 U.S.C. § 1592(a), and sought penalties in the amount of $5,284,000 under 19 U.S.C. § 1592(c)(1). In count 4, Customs alleged that Natori's violations of section 1592(a) in 1981 and 1982 resulted in the loss of approximately $1,000,000 in duties, which Customs sought to recover pursuant to 19 U.S.C. § 1592(d).

After a bench trial, the court found that Natori had been grossly negligent with respect to its entries in 1985 and held that the government was entitled to recover $32,859.04 in penalties for that violation. With respect to the 1981 and 1982 entries, the court found that the government had failed to establish by clear and convincing evidence that Natori had fraudulently undervalued its merchandise to deprive the United States of lawful duties; the court therefore denied the government's request for penalties in connection with those entries. The court found, however, that Natori had been at least negligent in its accounting practices during 1981 and 1982, and that its negligence had resulted in underreporting the dutiable value of imports during those years. The court then calculated the duties owed for those two years to be $438,176.27 and entered judgment for the government in that amount, plus interest.

II

Natori's principal argument on appeal is that the five-year statute of limitations set forth in 19 U.S.C. § 1621 bars the government's claim for duties under 19 U.S.C. § 1592(d) for the 1981 and 1982 entries. The Court of International Trade held that the statute of limitations in the version of section 1621 that was in effect at the time this case was brought did not apply to the collection of duties under section 1592(d). We agree.

Section 1592(a) provides that no person through fraud, gross negligence, or negligence may enter, introduce, or attempt to enter or

introduce any merchandise into the United States by means of a material false document or statement, or a material omission. Section 1592(c) lists various remedies for violations of section 1592(a), including penalties and forfeitures. In addition, section 1592(d) provides that if the government has been deprived of lawful duties as a result of a violation of section 1592(a), "the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed."

Section 1592 does not contain a limitations period for the recovery of either penalties or lost duties. Instead, the limitations period applicable to section 1592 is found in 19 U.S.C. § 1621. At the time of the entries and the filing of the present action, section 1621 provided, in pertinent part:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided*, That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed. * * *

19 U.S.C. § 1621 (1980). That version of section 1621 referred only to penalties and forfeitures. In 1993, however, Congress amended section 1621 to add a reference to the recovery of duties under section 1592(d). That amendment makes clear that in cases governed by the amended version of section 1621, an action for the recovery of duties is subject to the five-year limitations period. In its amended form, section 1621 now provides, in pertinent part:

> No suit or action to recover any duty under section 1592(d), 1593a(d) of this title, or any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered; except that—
>
> (1) in the case of an alleged violation of section 1592 or 1593a of this title, no suit or action (including a suit or action for restoration of lawful duties under subsection (d) of such sections) may be instituted unless commenced within 5 years after the date of the alleged violation or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud * * *.

19 U.S.C. § 1621(1994).

Natori argues that the 1993 amendment to section 1621 merely codified the correct interpretation of former section 1621 by making explicit that the five-year limitations period applies to the recovery of duties as well as penalties under section 1592. Accordingly, Natori argues, the court should construe the five-year limitations period of the pre-1993 version of section 1621, which governs this case, to apply to the recovery of duties under section 1592(d).

We find that argument unconvincing. It is well settled that a statute of limitations applicable to a government enforcement action must be clear and unambiguous, and that in the absence of a clearly expressed congressional bar, the government action is not subject to any time limitation. *See, e.g., DuPont de Nemours & Co. v. Davis,* 264 U.S. 456, 462 (1924); *United States v. Tri-No Enters., Inc.,* 819 F.2d 154, 158 (7th Cir. 1987); *United States v. City of Palm Beach Gardens,* 635 F.2d 337, 339 (5th Cir. 1981). On its face, former section 1621 applied only to a "pecuniary penalty or forfeiture of property." The recovery of an unpaid duty under section 1592(d), however, is neither a penalty nor a forfeiture. *See United States v. Blum,* 858 F.2d 1566, 1569 (Fed. Cir. 1988). Moreover, the government's right to recover unpaid duties under section 1592(d) does not depend on its right to obtain penalties pursuant to section 1592(c). *Id.* Therefore, even though the recovery of penalties for Natori's entries in 1981 and 1982 was expressly barred by the limitations period of former section 1621, an action for the recovery of unpaid duties was not so barred.

We do not attach great weight to the fact that Congress added an explicit limitations period for the recovery of duties under section 1592(d) when it amended section 1621 in 1993. It is not unknown for Congress to amend a statute simply in order to make explicit what was implicit before. Nonetheless, the circumstances surrounding the amendment give force to the conclusion that the pre-amendment version of section 1621 did not apply to actions for the recovery of duties under section 1592(d). In particular, the House committee report accompanying the amendment to section 1621 stated that the amendment "creat[es] a statute of limitations for the recovery of lawful duties of which the United States was deprived as a result of a violation of 19 U.S.C. § 1592." H.R. Rep. No. 103–361(I), at 152 (1993), *reprinted in* 1993 U.S.S.C.A.N. 2552, 2702. There could hardly be a clearer statement of the Committee's understanding that the pre-amendment version of section 1621 did not apply to the recovery of unpaid duties under section 1592(d).

In response to this evidence of Congress's understanding of the pre-1993 version of the scope of section 1621, Natori cites a statement made by Commissioner of Customs Robert E. Chasen during his 1978 testimony before a House committee that was considering an amendment to section 1592. In advocating the proposed amendment. Commissioner Chasen testified that Customs interpreted the proposed legislation "as allowing the government to collect all duties (not previously collected) arising out of the discovery of a section [1592] violation (whether or not a monetary penalty is assessed), limited only by the five year statute of limitations." *Customs Procedural Reform Act of 1977: Hearings on H.R. 8149 and H.R. 8222 Before the Subcomm. On Trade of the House Comm. On Ways and Means,* 95th Cong. 46, 57–58 (1977). That remark does not provide a sufficient basis to disregard the plain statutory language and infer the presence of a statute of limita-

tions for the collection of unpaid duties when Congress had not imposed one.

Natori argues that the title of section 1592—"Penalties for fraud, gross negligence, and negligence"—informs the scope of the section. Accordingly, Natori argues, actions for the recovery of unpaid duties under section 1592(d) necessarily fall within the reach of former section 1621, which applied the statute of limitations to "any pecuniary penalty or forfeiture of property." As we have noted, however, this court held in *Blum* that the recovery of duties under section 1592(d) is not a penalty, and the inclusion of section 1592(d) within a statutory section denominated "penalties" does not make it one. As the court noted in *Blum*, the fact that the title of section 1592 refers to penalties "is not to say that each and every subsection of that section is to be characterized as a penalty provision." 858 F.2d at 1569. The titles of statutes are simply reference guides and cannot limit or contravene the statutory text. *See Railroad Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528–529 (1947) (statutory heading "is but a short-hand reference to the general subject matter involved"). Section 1592 deals mainly with penalties and forfeitures, so it is not surprising that the title of the statute refers to penalties and forfeitures, even though one portion of the statute provides a remedy that does not fit within that category. In sum, Natori has failed to persuade us that former section 1621 should be read, contrary to its plain terms, to impose a limitations period on the collection of unpaid duties of which the government was deprived as the result of a violation of section 1592(a).

III

Natori next argues that the government failed to prove a section 1592(a) violation, which is a predicate to the recovery of unpaid duties under section 1592(d). In particular, Natori contends that the government fell short in several ways in its effort to show that Natori understated the dutiable value of the goods imported during 1981 and 1982.

First, Natori argues that the trial court erred in relying on copies of entry forms that were maintained by Natori's broker rather than requiring the government to produce the original processed forms. However, Natori presented no evidence that any of the entry forms on which the court relied were altered in the course of processing. While the evidence on which the government relied was not as conclusive as the processed entries would have been, the copies of the entries were nonetheless admissible, probative evidence. We decline Natori's invitation to adopt a rule that the government's failure to introduce all of the processed entry forms requires that judgment be entered against it for failure of proof.

Second, Natori argues that the Customs auditor who testified at trial misunderstood Natori's accounts-payable ledger and therefore reached a false conclusion about the difference between the actual dutiable value and the declared dutiable value of the goods imported during 1981 and 1982. Pointing to testimony from its own expert and an FFI representa-

tive. Natori argues that the ledger included cost accounting data from FFI, and that it did not represent differences between the declared and actual value of the imported goods. The Customs auditor, however, addressed the question of the accounts-payable ledger at length and explained in some detail the grounds for his conclusion that the ledger reflected amounts payable by Natori to FFI and thus demonstrated that the declared value of the imported goods was less than their actual value. Moreover, although the testimony of Natori's expert supports Natori's theory that Natori was simply monitoring FFI's costs, the expert testified that he did not consult with the pertinent Natori and FFI officials about their accounting practices. Under these circumstances, the trial court was entitled to credit the Customs auditor's testimony over the testimony of Natori's witnesses.

Third, Natori argues that the trial court found that the balances listed in the Natori accounts-payable ledger were variances, and that the court improperly concluded that the listed amounts were dutiable without finding that those amounts were paid or payable to FFI. The trial court, however, found that the balances were not variances. In so finding, the court relied on the testimony of the Customs auditor and noted that the balances were entered in the importer's accounts-payable ledger, which is not a typical place to find a listing of the manufacturer's variances. Contrary to Natori's suggestion, there is no indication that the trial court regarded the balances in the accounts-payable ledger as dutiable even if they were not amounts paid or payable by Natori. Accordingly, because the court found that the ledger balances represented amounts payable, the court properly concluded that the balances "represented undeclared value upon which duties must be paid."

IV

Natori's final contention is that the duty rates that the trial court selected for 1981 and 1982 were too high. Because of uncertainty about the nature of the goods imported at the time of the false entries in 1981 and 1982, the court could not determine the duty rate at which those goods should be assessed. The court therefore calculated the unpaid duties by reference to a constructed "average duty rate" that the government determined for all of Natori's 1981 and 1982 imports. The trial court, however, did not explain the analysis that led the government to propose and the court to adopt 42.5 percent as the average duty rate for 1981 and 39.4 percent as the average duty rate for 1982. Natori argues that those rates are unjustifiably high, and points out that the average duty rate selected for 1981 was the highest duty rate applicable to any of Natori's imported goods during that year, and that the average duty rate for 1982 was very close to the highest duty rate applicable to Natori's imported goods during that year. The trial testimony that the government quotes in its brief does not provide a sufficient basis for us to determine whether the derived average duty rates are correct, and our independent review of the record has not shed any additional light on this issue. Accordingly, we remand the case to the Court of International Trade for

an explanation of the court's selection of the average duty rates of 42.5 percent for 1981 and 39.4 percent for 1982, and for an adjustment of those rates if, upon reexamination, the court deems any such adjustment to be required.

Each party shall bear its own costs for this appeal.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED.

SAMSUNG ELECTRONICS AMERICA, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 96–1127

(Decided February 3, 1997)

Thomas Joseph Kovarcik, Irving A. Mandel, Counselor at Law, of New York, New York, argued for plaintiff-appellant. With him on the brief were *Irving A. Mandel*, and *Jeffrey H. Pfeffer*.

Bruce N. Stratvert, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Frank W. Hunger*, Assistant Attorney General and *David M. Cohen*, Director, of Washington, D.C., and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, of New York, New York. Of counsel on the brief was *Mark G. Nackman*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of New York, New York.

Appealed from: United States Court of International Trade.
Judge GOLDBERG.

Before MAYER, MICHEL and RADER, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MICHEL. Dissenting opinion filed by Circuit *Judge* MAYER.

MICHEL, *Circuit Judge*.

Samsung Electronics America, Inc. ("Samsung") appeals from the Order of the United States Court of International Trade entered October 26, 1995 in *Samsung Elecs. Am., Inc. v. United States*, 904 F. Supp. 1403 (Ct. Int'l Trade 1995), in which the trade court (a) denied Samsung's motion for summary judgment on its claims for duty refunds due to the diminution in value of merchandise it imported from its parent corporation, the manufacturer, that contained latent manufacturing defects upon importation, and (b) granted the government's cross-motion for summary judgment. The appeal was submitted for our decision following oral argument on December 3, 1996. Because we hold the trade court misinterpreted the sales contracts for the SAMSUNG electronic equipment by incorrectly concluding that Samsung had ordered both defect-free and defective equipment, we reverse. We remand for a determination of the allowance to be made under the applicable regulation for reduced value because of the defects.

BACKGROUND

During the time relevant here, 1987 to 1990, Samsung imported various types of electronic equipment manufactured by its parent company, Samsung Electronics Co., Ltd. ("manufacturer") in Korea. Samsung then resold the equipment bearing both companies' brand name SAMSUNG to consumers in America. These resales were covered by consumer warranties that the equipment was free of manufacturing defects.

The United States Customs Service ("Customs") assessed tariffs based on the transaction value of the imported equipment. This transaction value was determined using the price actually paid by Samsung when it purchased the equipment from the manufacturer, as provided in 19 U.S.C. § 1401a (1994). As part of the sales contracts, Samsung and the manufacturer entered into Servicing Agent Agreements ("service agreements") which stated "the Products exported to the United States are *occasionally* in need of the inspection, repair, refurbishing, and such other customer requested services * * *." (emphasis added). The service agreements obligated the manufacturer to reimburse Samsung up to 5% of the total purchase price per year for the cost of these inspections, repairs and refurbishings.

During the time covered by these sales contracts and service agreements, some of the imported electronic equipment was found to have contained latent defects when imported. Samsung either sold the equipment containing such manufacturing defects at a discount and with the SAMSUNG label removed, or repaired it in the United States either before sale or under the consumer warranties when consumers sent it back. Samsung's cost accounting system kept track of these losses and repair costs. When consumers asserted their rights under their consumer warranties with Samsung, only those defects that existed at the time of importation were repaired and considered repair costs in Samsung's accounting system. Samsung asserted its rights under the service agreements and the manufacturer reimbursed Samsung for its losses incurred in the discounted sales and the costs incurred to repair the defects. This reimbursement was equal to 4.7% of the total purchase price.

Samsung filed a claim with Customs under what are now 19 C.F.R. § 158.12 and 19 U.S.C. § 1401a(b)(3)(A)(i) for the valuation of the defective merchandise and, consequently, the duties assessed, to be reduced by a reasonable allowance for the diminished value due to the latent manufacturing defects. Customs rejected both Samsung's claim and its subsequent protest. Samsung then brought the instant action in the Court of International Trade. The court granted the government's motion for summary judgment and Samsung timely appealed. We have jurisdiction under 28 U.S.C. § 2645(c) (1994).

DISCUSSION

Samsung argues that the dutiable value of the defective merchandise must be reduced pursuant to either 19 C.F.R. § 158.12 or 19 U.S.C. § 1401a(b)(3)(A)(i).[1] The regulation, 19 C.F.R. § 158.12 (1990), states:

> Merchandise which is subject to *ad valorem* or compound duties and found by the district director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage.

Customs has asserted that this regulation applies only to defective merchandise that is lesser merchandise than that which was ordered.[2] As the agency charged with administering the statute and related regulations, Customs' interpretation of its own regulation, assuming that Congress has not spoken directly to the issue, is entitled to deference so long as it is reasonable. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Since we conclude Congress has not spoken directly to this issue, we defer to Customs' interpretation and hold that 19 C.F.R. § 158.12 applies when the merchandise received is worth less than the merchandise that was ordered.

The questions therefore become: What did Samsung order in the sales contracts? Was it only defect-free merchandise? Or was it a mix of defect-free and defective merchandise? The trial court analyzed as follows:

> Having determined that 19 C.F.R. § 158.12 applies only when an importer receives merchandise that is of a lesser quality than that for which he contracted, the Court turns to consider whether the regulation authorizes a reduction in the value of the subject merchandise. When Samsung America purchased the subject merchandise from Samsung Korea, it did not contract only for defect-free merchandise. Samsung America also entered into the Agreements under which it received compensation for loss and repair costs resulting from defective merchandise. (Pl.'s Mot. For Summ. J., Ex. 1.) Hence, Samsung America contracted to receive the following items from Samsung Korea: (1) defect-free merchandise; and (2) defective merchandise for which it had a contractual right to compensation for loss or repair. When the merchandise arrived in the United States, Samsung America received no less than that for which it had contracted. Consequently, the Court finds that 19 C.F.R. § 158.12 does not entitle Samsung America to a reduction in value.

Samsung, 904 F.2d at 1405. Thus, in a single, conclusory paragraph, the trade court, based solely on the fact of the service agreements, held that Samsung had ordered both defect-free and defective merchandise. We disagree with the trade court's contract interpretation.

Contract interpretation is ordinarily an issue of pure law, which we review entirely de novo. *C. Sanchez & Son, Inc. v. United States*, 6 F.3d

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[1] Since we resolve this case under section 158.12, we decline to reach Samsung's section 1401a argument.

[2] *See* Customs Service Decision 84–11 ("This ruling holds that relief may be authorized * * * provided that the importer has submitted clear, concise and convincing evidence to support a claim that the merchandise purchased and appraised as one quality was in fact of a lesser quality.").

1539, 1544 (Fed. Cir. 1993); *Interstate Gen. Govt Contractors v. Stone*, 980 F.2d 1433,1434 (Fed. Cir. 1992). In interpreting a written contract, the intent of the parties, for instance as evidenced by the written instruments forming the contract, is of primary concern. *See Ralden Partnership v. United States*, 891 F.2d 1575, 1577 (Fed. Cir. 1989). Here, the trial court misconstrued the sales contracts, ignoring Samsung's consumer warranties, its relationship to the manufacturer, and commercial reality.

First, the very service agreements relied on by the trade court belie its interpretation. The agreements do not show that Samsung ordered defective as well as defect-free merchandise. Rather, they show that Samsung ordered only perfect merchandise and contracted specifically to address the inevitability that, despite its order, some of the merchandise delivered would contain latent manufacturing defects. The contract's explicit recognition of the reality of mass production (or, for that matter, any kind of production), namely that in some products there will be manufacturing defects, does not mean that Samsung "ordered" defective merchandise or both defect-free and defective merchandise. The government agrees that the contracts did not specifically call for "defective" merchandise (or equivalent terms), and we think the service agreements support the interpretation that Samsung sought, and its parent company, the manufacturer, agreed to deliver, wholly defect-free merchandise, effectively so guaranteeing by agreeing to reimburse for any defects, up to 5% of total sales per year.

Second, Samsung expressly warranted defect-free merchandise to its customers. The existence of these consumer warranties demonstrates that Samsung is in the business of selling defect-free merchandise and so holds itself out. That was its intent and its customers' expectation. After all, the electronic equipment bore the brand name SAMSUNG, linking it with both Samsung America and Samsung Electronics of Korea.

Finally, the close corporate and functional relationship of the two companies supports the inference that only defect-free merchandise was ordered in these sales contracts. Samsung America is essentially the American distributor for Samsung Electronics of Korea. It makes no commercial sense for Samsung to purposefully deal in defective goods, thereby risking customer dissatisfaction upon receiving such goods despite purchasing brand-name equipment. For Samsung to order defective merchandise from its parent company would be extremely poor business practice.

Since all indications are that Samsung ordered only defect-free merchandise and we see nothing that supports the trade court's contrary contract interpretation, we hold that these sales contracts call for *only* defect-free merchandise.

The sole authority relied upon by the trial court, *Esprit de Corp. v. United States*, 817 F. Supp. 975 (Ct. Int'l Trade 1993), supports (at least in dicta) Customs' interpretation that section 158.12 applies only when

an importer receives lesser goods than it ordered. However, the decision is irrelevant because, as noted above, we hold that Customs' interpretation of its regulation is reasonable. The *Esprit* decision therefore cannot aid our disposition of this appeal which turns instead on the interpretation of the contracts at hand. Neither can it support the trade court's interpretation of the sales contracts because the decision has not been shown to involve comparable contracts. Therefore we cannot agree with the ruling below and the government's argument here that *Esprit* compels rejection of Samsung's claim.

The dissent states that "Samsung did not order defective merchandise, but it did order merchandise knowing some of it would contain latent defects." That is, Samsung expected some defective merchandise. The dissent concludes from this that section 155.12 does not apply. The difference between the dissent's analysis and our own is that we believe that Samsung "ordered" defect-free merchandise by requesting brand name merchandise and contractually ensuring the delivery of defect-free merchandise or reimbursement through the servicing agreements.[3] Samsung paid for defect-free merchandise and that is, through reimbursement, what Samsung effectively received. We do not believe that the mere recognition on Samsung's part that, at the moment of importation, some of the merchandise unavoidably would contain latent manufacturing defects, vitiates the mutual intent of Samsung and the manufacturer to contract for defect-free merchandise. Since Customs' interpretation of the regulation correctly focuses on what was *ordered*, we believe the focus of the dissent on what was *expected* to be mistaken. Thus, the dissent incorrectly focuses on what "Samsung thought it would receive" and what it "anticipated."

Furthermore, the fact that Samsung ultimately received the economic equivalent of perfect goods (through reimbursement) does no violence to Customs law or policy. It is undisputed that some of the goods Samsung imported contained latent manufacturing defects at the time of importation. They were therefore worth less than defect-free goods. Duties are assessed on the value of goods *as imported*. Here, the value added to the goods (via repair) was added in the United States after importation. Value subsequently added in the United States is not dutiable. *See* 19 U.S.C. § 1401a (d)(3)(A)(v) (1994).

We therefore reverse the trial court's summary judgment that section 158.12 does not apply, and remand for a determination of the "allowance [to be] made in the value to the extent of the damage." 19 C.F.R. § 158.12.[4]

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[3] We decline to comment on the interpretation of contracts where there might not be service agreements or consumer warranties or any of the other factors we consider here. The legal question, as mandated by the Customs interpretation of the regulation, though, remains the same: what did the importer order?

[4] For purposes of the remand, we specially note that only those defects in existence at the time of importation qualify for an "allowance" in value. Samsung thus bears the burden of proving, for instance, that the costs to repair defects under consumer warranties were incurred to repair defects in existence at importation, and not, for instance, those caused by its own mishandling or by consumer misuse of the equipment.

COSTS

Each party to bear its own costs.

REVERSED AND REMANDED

MAYER, *Circuit Judge*, Dissenting.

Because the Court of International Trade correctly concluded that Samsung Electronics America, Inc. ("Samsung") received the quality of goods it ordered, I would affirm.

Samsung purchased and imported televisions, stereos, video cassette recorders, microwave ovens, de-humidifiers, and other electronic articles from Samsung Electronics Co., Ltd. ("manufacturer") in Korea. Both parties entered into annual Servicing Agent Agreements requiring the manufacturer to reimburse Samsung on a monthly basis for the cost of Samsung's inspection, repair, refurbishing and other customer-related services. This reimbursement was limited to five percent of the total value of the imported products over the course of each year.

Pursuant to 19 U.S.C. § 1401a(b), the Customs Service appraised the imported merchandise on the basis of the transaction value, using the price Samsung actually paid the manufacturer for the merchandise. Samsung paid the assessed duties and sold the merchandise along with limited warranties to its customers. Some of the merchandise was returned as defective under the warranties. The manufacturer reimbursed Samsung for losses and repair costs associated with these warranty returns.

Samsung sought a reduction in Customs' appraisal of, and a concomitant refund for, the amount of duties it paid for the defective merchandise. Customs refused to adjust the duties. The Court of International Trade affirmed Customs' refusal, finding that Samsung received the quality of goods it ordered under its contract with the manufacturer. *Samsung Elec. Am., Inc. v. United States*, 904 F. Supp. 1403 (Ct. Int'l Trade 1995). As it did below, Samsung argues on appeal that it bargained for first quality defect-free merchandise. It believes that under 19 C.F.R. § 158.12, the existence of latent defects requires Customs to reduce the appraised dutiable value of the merchandise and refund the difference.

Because contract interpretation is a question of law, we must determine de novo whether the contract between Samsung and its manufacturer anticipated the delivery of wholly defect-free merchandise or the delivery of some defect-free merchandise as well as some that may be defective. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 957 (Fed. Cir. 1993). We look to the plain language of the contract and interpret it in a manner that gives meaning to all of its provisions and makes sense. *McAbee Constr. Inc. v. United States*, 97 F.3d 1431,1435 (Fed. Cir. 1996).

In support of its argument that the contract called for first quality defect-free merchandise, Samsung points only to the affidavit of Thomas Tesi, its General Manager of National Distribution. This affidavit states in relevant part:

> The entered value of the merchandise was the price paid or payable for first quality, defect-free merchandise.
>
> That price paid or payable did not contain any deduction or allowance for latent defects in the merchandise.
>
> [The manufacturer] guaranteed to [Samsung] that the subject merchandise would be of first quality and defect-free as ordered. This guaranty was set forth in a contract between [the manufacturer] and Samsung known as a 'Service Agreement'. * * * The Service Agreements set forth quality standards for the merchandise and provided for their enforcement by obligating [the manufacturer] to reimburse [Samsung] for any losses or costs of repair that [Samsung] incurred as a result of defects in the merchandise.
>
> Such merchandise was not worth the price that [Samsung] had paid to [the manufacturer] for it.

Tesi's self-serving assertions add nothing to our understanding of the contract or to the parties' contemporaneous intentions. Without some explanation about how or why the cost of defective goods was imposed on one party and not the other, Tesi's statements cannot favor one party's interpretation over the other's. Nor do his statements serve as evidence of Samsung's intentions, absent some contemporaneous explanation as to why Samsung thought it would receive defect-free goods when standard industry practices inevitably resulted in delivery of some defective merchandise.

In contrast to these unhelpful statements, the following clauses in the Servicing Agency Agreements illustrate that the parties anticipated the delivery of both defect-free and some defective merchandise.

> Whereas the Products exported to the United States are occasionally in need of the inspection, repair, refurbishing, and such other customer requested services * * *.
>
> For the Services rendered [by Samsung] hereunder, [the manufacturer] shall pay [Samsung] on monthly basis a service charge the amount of which shall not exceed five percent (5%) of the total amount of the Products exported to the United States in a relevant year * * *.

In fact, and as confirmed by Samsung, Samsung received first class merchandise that was defect-free, as well as defective merchandise amounting to four-point-seven percent (4.7%) of the total amount of the products; almost exactly what it had anticipated. On these facts, it is difficult to imagine how Samsung can now claim that it ordered or anticipated completely defect-free merchandise or that it paid duties based on the receipt of defect-free merchandise. Both commercial reality and the specifics of these transactions show that Samsung knew exactly what it ordered and that it anticipated what it received. In contrast, this court

denies these facts by relying on the ex post facto self-serving statements of a party about what it would like to have received in a perfect world and by creating a false choice between two possibilities: ordering defect-free merchandise or ordering defective merchandise. Neither possibility accurately describes the contract between Samsung and its manufacturer. Samsung did not order defective merchandise, but it did order merchandise knowing some of it would contain latent defects.

MICRON TECHNOLOGY, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, HYUNDAI ELECTRONICS INDUSTRIES CO., LTD., HYUNDAI ELECTRONICS AMERICA, INC., LG SEMICON CO., LTD., AND LG SEMICON AMERICA, INC., DEFENDANTS-APPELLEES, AND SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG SEMICONDUCTOR, INC., DEFENDANTS

Appeal No. 96–1181

(Decided June 30, 1997)

Gilbert B. Kaplan, Hale and Dorr, of Washington, D.C., argued for plaintiff-appellant. Of counsel on the brief were *Paul W. Jameson, Cris R. Revaz,* and *John M. Ryan.*

Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., argued for defendant-appellee the United States. With her on the brief were *Frank W. Hunger,* Assistant Attorney General, and *David M. Cohen,* Director. Of counsel on the brief were *Stephen J. Powell,* Chief Counsel for Import Administration, U.S. Department of Commerce, *Berniece A. Browne,* Senior Counsel, and *Patrick V. Gallagher,* Attorney-Advisor.

Lawrence R. Walters, Graham & James, LLP, of Washington, D.C., argued for defendants-appellees Hyundai Electronics Industries Co., Ltd., and Hyundai Electronics America, Inc. Of counsel was *Andrea Fekkes Dynes.*

Raymond Paretzky, Kaye, Scholer, Fierman, Hays & Handler, LLP, of Washington, D.C., argued for defendants-appellees LG Semicon Co., Ltd. and LG Semicon America, Inc. With him on the brief was *Michael P. House.*

Appealed from: United States Court of International Trade.
Judge GOLDBERG.

Before PLAGER, RADER, and SCHALL, *Circuit Judges.*

SCHALL, *Circuit Judge.*

This is an antidumping case. Micron Technology, Inc. ("Micron") appeals from the June 12, 1995 decision of the United States Court of International Trade in favor of the United States, Hyundai Electronics Industries Co., Ltd. and Hyundai Electronics America, Inc. (collectively "Hyundai"), and LG Semicon Co., Ltd. and LG Semicon America, Inc. (collectively "LG Semicon") in *Micron Technologies, Inc. v. United States,* 893 F. Supp. 21 (Ct. Int'l Trade 1995). The court's decision affirmed aspects of the final determination of the United States Department of Commerce, International Trade Administration ("Commerce" or "ITA"), as issued and amended, that Korean dynamic random access

memory semiconductors ("DRAMs") of one megabit and above were being sold in the United States at less than fair value ("LTFV"). *Final Determination of Sales at Less than Fair Value,* 58 Fed. Reg. 15,467 (Mar. 23, 1993) ("Final LTFV Determination"); *Antidumping Duty Order and Amended Final Determination,* 58 Fed. Reg. 27,520 (May 10, 1993) ("Amended Final LTFV Determination"). The determination resulted in the imposition of an antidumping duty order with respect to Hyundai and LG Semicon. Micron contends that in the process of calculating the antidumping duty, Commerce failed to verify properly Hyundai Electronics Industries Co., Ltd.'s ("HEI") and LG Semicon Co., Ltd.'s ("LGS") costs of production. We affirm.

BACKGROUND

Under the statutory provision governing the imposition of antidumping duties, additional duties are imposed on imported merchandise that is being sold, or that is likely to be sold, in the United States at less than fair value to the detriment of a domestic industry. 19 U.S.C. § 1673 (1988).[1] A duty, otherwise known as the "dumping margin," is imposed that is equal to the "amount by which the foreign market value exceeds the United States price for the merchandise." *Id.*

Antidumping proceedings normally are commenced when an "interested party" files a petition with Commerce and simultaneously files a copy of the petition with the International Trade Commission ("ITC"). 19 U.S.C. § 1673a(b). In the petition, the interested party must allege the elements necessary for the imposition of an antidumping duty pursuant to 19 U.S.C. § 1673.

On April 22, 1992, Micron filed a petition with Commerce, alleging that Korean DRAMs of one megabit and above were being sold in the United States at less than fair value and were being sold in the home market at less than the cost of production. Micron also alleged that an industry in the United States was being materially injured, or threatened with material injury. *See Initiation of Antidumping Duty Investigation: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea,* 57 Fed. Reg. 21,231 (May 19, 1992). In response, Commerce investigated Korean DRAM sales for the period of investigation running from November 1, 1991, through April 30, 1992. 58 Fed. Reg. at 15,467–15,468.

Following an affirmative preliminary injury determination by the ITC,[2] *see Dynamic Random Access Memories of One Megabit and Above From the Republic of Korea,* 57 Fed. Reg. 27,063 (June 17, 1992), Com-

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[1] Effective January 1, 1995, the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809, amended the antidumping laws in a number of respects. The URAA does not apply to antidumping investigations, such as the one in this case, that were initiated before January 1, 1995. Citations are to the antidumping laws before these amendments. In the interest of clarity, we use the present tense when discussing statutory provisions. Unless otherwise indicated, all references are to the 1988 version of the United States Code.

[2] Unless Commerce dismisses an interested party's petition because it does not meet the requirements of 19 U.S.C. § 1673, the ITC has the responsibility of making a preliminary determination as to whether a domestic industry has been injured by "reason of imports of the merchandise which is the subject of the investigation by [Commerce]." 19 U.S.C. § 1673b(a).

merce served questionnaires on HEI and LGS,[3] soliciting financial information pertinent to the sales at less than fair value investigation.[4] The questionnaires covered a broad spectrum of financial information, including cost of production data. After analyzing initial and supplemental questionnaire responses, Commerce made a preliminary affirmative determination of sales at less than fair value. In so doing, it relied on HEI's submitted cost of production information but rejected some of LGS's submitted information in favor of the best information available. *Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea,* 57 Fed. Reg. 49,066 (Oct. 29, 1992).

Shortly after the preliminary determination, Commerce personnel traveled to Korea to verify the responses received from the investigated parties. In Korea, Commerce conducted a six-day verification study at HEI's production facility and head office. Commerce also spent six days conducting a verification study at LGS's facilities in Korea.

On January 11, 1993, Commerce issued its verification reports, entitled "Verification of Cost of Production: Hyundai Electronics Industries Co., Ltd." and "Verification of Cost of Production and Constructed Value: Goldstar Electron Co., Ltd." On February 2 and 3, 1993, after completing the verification process, Commerce held public hearings to address various verification issues. On March 23, 1993, Commerce, relying on the questionnaire responses submitted by HEI and LGS, published the Final LTFV Determination pursuant to 19 U.S.C. § 1673d(a)(1). In the Final LTFV Determination, Commerce determined that Korean DRAMs of one megabit and above were being sold in the United States at less than fair value. 58 Fed. Reg. at 15,481. Commerce also computed the relevant dumping margins, expressed in percentages, as follows:

Goldstar (LGS)	4.97
HEI	7.19
All others[5]	3.19

Id.

Following a final affirmative injury determination by the ITC, Commerce issued the Amended Final LTFV Determination on May 10, 1993. 58 Fed. Reg. at 27,520.[6] In so doing, Commerce corrected certain errors

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[3] During the period of investigation, LGS was known as Goldstar Electron Co., Ltd. ("Goldstar"). Commerce also investigated Samsung Electronics Co., Ltd. and Samsung Semiconductor, Inc. (collectively "Samsung"). Samsung has not participated in this appeal.

[4] Following an affirmative preliminary injury determination by the ITC, pursuant to 19 U.S.C. § 1673b(a), Commerce is charged with determining "whether there is a reasonable basis to believe * * * that the merchandise is being sold, or is likely to be sold, at less than fair value." 19 U.S.C. § 1673b(b)(1).

[5] The "all others" cash deposit rate applies to companies not investigated in the LTFV investigation. *See Federal-Mogul Corp. v. United States*, 822 F. Supp. 782, 784 (Ct. Int'l Trade 1993) (noting that "companies which were not investigated in the LTFV investigation * * * received the LTFV 'all others' cash deposit rate").

[6] If Commerce's final LTFV determination is affirmative, the ITC makes a final determination as to material injury. *See* 19 U.S.C. § 1673d(b)(1). If the ITC's determination is affirmative, Commerce issues a final antidumping duty order. *See* 19 U.S.C. §§ 1673d(c)(2), 1673e(a).

in the Final LTFV Determination and recomputed the dumping margins to be:

Goldstar (LGS)	4.97
HEI	11.16
All others	3.85

Id. at 27,522. These recomputed antidumping duties were assessed on "all unliquidated entries of dynamic [RAM] semiconductors of one megabit and above from the Republic of Korea entered, or withdrawn from warehouse, for consumption on or before October 29, 1992, the date on which the Department published its preliminary determination notice in the Federal Register * * *." *Id.* The dumping margins also applied as the cash deposit rates for entries occurring after October 29, 1992.

On June 8, 1993, Micron appealed to the Court of International Trade, challenging various aspects of Commerce's Final Amended LTFV Determination, as issued and amended.[7] *Micron*, 893 F. Supp. at 26. Hyundai, LG Semicon, and Samsung intervened as defendants. On June 12, 1995, the court issued a decision sustaining Commerce's determination in part and remanding in part with respect to issues not relevant here. *Id.* at 42–43. Of relevance to this appeal is the court's holding that Commerce applied a reasonable verification standard and that substantial evidence supports Commerce's verification results leading to the Final Amended LTFV Determination. *Id.* at 42.

In due course, Commerce filed its remand determination. After finding the remand determination to be in compliance with its prior decision, the Court of International Trade entered final judgment. Micron now appeals the Court of International Trade's June 12, 1995 decision. Specifically, it contests the court's determination that the test Commerce employed during verification was reasonable and was a permissible exercise of judgment. It also challenges the court's findings that substantial evidence supports Commerce's reliance on HEI's and LGS's cost of production data.

DISCUSSION

I.

We have exclusive jurisdiction over an appeal from a final decision of the Court of International Trade. 28 U.S.C. § 1295(a)(5) (1994). Before turning to the merits, however, we must address a jurisdictional issue raised by Hyundai and LG Semicon: The antidumping law provides for periodic review of antidumping duties. *See* 19 U.S.C. § 1675(a) (1994). On May 6, 1996, Commerce issued final results of the first administrative review in this case, computing, for the period running from October 29, 1992 through April 30, 1994, a 0.06 percent dumping margin for Hyundai and a zero percent dumping margin for LG Semicon. *Dynamic Random Access Memory Semiconductors of One Megabit or [sic] Above from the Republic of Korea, Final Results of Antidumping Duty Admin-*

[7] Review of a final LTFV determination by Commerce is available in the Court of International Trade pursuant to 19 U.S.C. § 1516a(a)(2).

istrative Review ("Final Results of the First Administrative Review"), 61 Fed. Reg. 20,216, 20,222 (May 6, 1996).

Hyundai and LG Semicon, recognizing that a controversy "must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated," *Roe v. Wade,* 410 U.S. 113, 125 (1973), contend that jurisdiction is defeated here because there no longer exists a case or controversy as required by Article III of the Constitution. U.S. Const. art. III, § 2. More particularly, Hyundai and LG Semicon submit that Commerce's publication of the Final Results of the First Administrative Review, in which the dumping margins found in the original antidumping investigation were modified, renders this case moot. This is so, they argue, because a revision of the original dumping margins computed as part of the Final Amended LTFV Determination, which is what Micron is seeking, will not affect the parties to this case.[8] Micron responds that the case is not moot.

Antidumping duties are computed through a series of reviews. As seen above, Commerce initially determines whether articles are being sold at less than fair value during the preliminary LTFV determination. That determination takes place within 160 days after the filing of the petition that commences the antidumping proceeding. 19 U.S.C. § 1673b(b)(1). Within 75 days after the preliminary LTFV determination, Commerce makes a final LTFV determination, determining whether the imported merchandise is being, or is likely to be, sold at less than fair value. *Id.* § 1673d(a)(1). Within approximately 45 days of the final LTFV determination, the ITC makes a final injury determination, *Id.* § 1673d(b)(2)(B), and if such determination is in the affirmative, Commerce issues an antidumping duty order. *Id.* § 1673d(c)(2). The dumping margin resulting from the antidumping investigation establishes the amount of the deposit of estimated duties for entries of covered merchandise up to the date of publication of the final results of the first administrative review. *Id.* § 1673e. Upon the first anniversary of the publication of the antidumping duty order or upon completion of the first administrative review, if requested by an interested party, duties are assessed and existing entries are liquidated. 19 C.F.R. § 353.22 (1996). Liquidation of new entries is suspended for each one-year period. *Id.* Upon each anniversary of the antidumping duty order, dumping margins may be reassessed through an administrative review if a request is made by an interested party. 19 U.S.C. § 1675(a) (1994). As recognized by the Court of International Trade, administrative review results serve as the basis for actual duty assessment with regard to the entries covered by the particular determination and as the basis for cash deposits of estimated duties for future entries." *Silver Reed Am., Inc. v. United States,* 9 CIT 221, 224 (1985). Thus, at the end of each one-year period the prior entries are liquidated in accordance with the original

[8] Except insofar as it pertains to the mootness question, the First Administrative Review is not at issue in this case.

dumping margins unless a review has been requested, in which case they are liquidated at the new margins.[9]

The thrust of Hyundai's and LG Semicon's mootness argument is that the Final Results of the First Administrative Review, which is not at issue in this appeal, established the amount of antidumping duties actually to be assessed on imports of subject merchandise produced and entered during the review period. In the Final Results of the First Administrative Review, Commerce also revised the cash deposit rate for estimated antidumping duties on merchandise imported in the future by Hyundai and LG Semicon. Consequently, Hyundai and LG Semicon note, the margins of 11.16 percent and 4.97 percent that were determined for HEI and LGS, respectively, in the Amended Final LTFV determination are no longer of any force or effect.

Micron does not dispute the fact that, as a result of the first administrative review, there now is no time period for which the dumping margins calculated for HEI and LGS in the Amended Final LTFV Determination apply. *Cf. Zenith Radio Corp. v. United States*, 710 F.2d 806, 808 (Fed. Cir. 1983) ("The next published section 751 review will abrogate the effect of the challenged determination on deposit amounts by establishing the margin to be used for assessment of actual antidumping duties on entries after March 31, 1980, and for estimating deposit amounts on subsequent entries.") Micron contends, however, that a ruling in its favor would affect the "all others" rate—the dumping rate applied to companies not subject to a separate dumping determination—that was computed as part of the Amended Final LTFV Determination. *Cf. id.* at 810 ("Even though the '79–'80 imported articles have already been sold and the increased duties (if Zenith ultimately prevails) will go to the government, not Zenith, Zenith still has a strong, continuing, commercial-competitive stake in assuring that its competing importers will not escape the monetary sanctions deliberately imposed by Congress. Defeat of that strong congressionally recognized competitive interest and the abrogation of effective judicial review are sufficient irreparable injury here."). We find Micron's argument persuasive.

The "all others" rate is generally computed, and Micron contends was computed in the case at bar, by taking a weighted average of the separate dumping margins. *See* Raj Bhala, *Rethinking Antidumping Law*, 29 Geo. Wash. J. Int'l L. & Econ. 1, 144 (1995) (noting that the "all others" rate is "[g]enerally * * * based on a weighted average of individual dumping margins calculated for those exporters that are individually investigated"). Therefore, the "all others" rate calculated during the Amended Final LTFV Determination was a product of HEI's and LGS's costs of production. It is true that HEI's and LGS's initial dumping rates were subsequently revised during the first administrative review and

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[9] Determination of new margins results in the return of excess deposited duties if the administrative review results in a lower dumping margin for the period which is reviewed. However, the payment of additional duties is not required if the administrative review results in a higher dumping margin for the period that is reviewed. 19 U.S.C. § 1673f(a).

thereafter no longer applied as the cash deposit rate. *See* 61 Fed. Reg. 20,216. However, the "all others" rate remained intact because, as recognized in *Federal-Mogul Corp. v. United States,* 822 F. Supp. 782, 788 (1993), the "all others" rate is not revised when the dumping margins used to compute the rate have been successfully challenged through an administrative review requested by an entity subject to a separate dumping rate. In the absence of an administrative review of the "all others" rate on the first anniversary of the Amended Final LTFV Determination, the original "all others" rate remained in effect as the cash deposit rate and as the assessment rate for the period of October 29, 1992 (the date of liquidation suspension) through April 30, 1994. *See* 19 U.S.C. § 1675(a); 19 C.F.R. § 353.22(e)(1) (1996) ("[I]f the Secretary does not receive a timely request * * *, the Secretary, without additional notice, will instruct the Customs Service to assess antidumping duties * * * at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposits previously ordered."). The "all others" rate survived the first administrative review of HEI's and LGS's dumping margins. In addition, the "all others" rate is properly challenged on appeal by virtue of the fact that it was derived in part from HEI's and LGS's submitted cost of production information. Before the Court of International Trade, Micron challenged the adequacy of that information. Consequently, we find this case very much alive.

II.

A.

In accordance with *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556 (Fed. Cir. 1984), we apply anew to Commerce's factual determinations the standard of review applied by the Court of International Trade. *Id.* at 1559 n.10 ("We review the [Court of International Trade's] review of an ITC determination by applying anew the statute's [19 U.S.C. § 1516a(b)(1)(B)(i)] express judicial review standard."). In doing so, we uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). "Substantial evidence" has been defined as "more than a mere scintilla," as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). To determine if substantial evidence exists, we review the record as a whole, including all evidence that "fairly detracts from the substantiality of the evidence." *Atlantic Sugar,* 744 F.2d at 1562.

Micron's challenge to the Amended Final LTFV Determination is based on its assertion that Commerce did not properly verify HEI's and LGS' costs of production. Micron submits that HEI's and LGS's verification responses must be traceable from the responses they submitted to Commerce's questionnaires through to each company's financial statements and that, for this court to uphold the verification process,

the trace must be supported by substantial evidence on the record. Thus, in articulating the verification requirement, Micron states that

> [w]hat is required is that for whatever sample numbers in the cost response that Commerce selects to trace, * * * there be a complete, unbroken chain of data that links the cost response numbers to the financial statements in a way that can satisfy Commerce (and reviewing courts) that all costs have been accounted for, and that the costs have been reasonably allocated to the merchandise that is the subject of the investigation.[10]

Micron contends that the record in this case does not support a conclusion that, in the course of the verification process, Commerce successfully performed the required traces with respect to crucial cost data and that therefore Commerce should not have relied upon the cost of production information submitted by HEI and LGS, but should have resorted to the best information available. Micron stresses its contention that the results of the verification process must be *on the record* for the verification to be considered supported by substantial evidence.

B.

As already seen, if the ITC finds that dumping is occurring to the detriment of a domestic industry, Commerce is required to impose antidumping duties on the imported merchandise. 19 U.S.C. § 1673. An antidumping duty represents "the amount by which the foreign market value [FMV] exceeds the United States price [USP] for the merchandise." *Id.*[11] The statute requires Commerce to impose antidumping duties if it is determined, during an antidumping investigation, that:

> foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value (or foreign market value),[12] and * * *
>
> (A) an industry in the United States—
> (i) is materially injured, or
> (ii) is threatened with material injury * * *
> by reason of imports of that merchandise * * *

Id.

Micron does not dispute Commerce's finding of sales at less than fair value or the ITC's injury determination, both made during the investigative stage. Instead, it argues that there were deficiencies in the cost of production information upon which Commerce relied in computing FMV. FMV is generally the price at which the exporter sells the subject merchandise in its home market or to third countries other than the United States. *Id.* § 1677b(a)(1). In the case at bar, FMV was calculated on the basis of the constructed value of the merchandise. *See id.*

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[10] Micron contends that a foreign producer's tendency to shift costs away from merchandise that is the subject of an antidumping investigation makes it imperative that the claimed production costs be traced back to the company's audited financial statements, because those statements are the best source of *all* of the company's costs.

[11] This relationship can be expressed mathematically as: Dumping Margin = FMV-USP. *See* 19 C.F.R. § 353.2.

[12] "Fair value" is defined, by regulation, as "an estimate of foreign market value." 19 C.F.R. § 353.42 (1996).

§ 1677b(a)(2).[13] Constructed value is determined by adding profit to the cost of production. *See id.* § 1677b(e) (defining constructed value). Thus, the dumping margins in this case were computed using the following mathematical equation:

Dumping Margin = (Cost of Production + Profit) – USP.

Because the constructed value was used as a surrogate for FMV in Commerce's calculations, Hyundai's and LG Semicon's dumping margins, and consequently the "all others" margin, were derived in part from HEI's and LGS's costs of production.

Commerce's reliance upon HEI's and LGS's submitted costs of production was proper only if Commerce was able to verify successfully the submitted information. Section 1677e(b) of Title 19 of the United States Code provides, in pertinent part, as follows:

> The administering authority [Commerce] shall verify all information relied upon in making—
> (1) a final determination in an investigation * * * in publishing notice of any action referred to in paragraph (1), * * * the administering authority shall report the methods and procedures used to verify such information. If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action, which may include, in actions referred to in paragraph (1), the information submitted in support of the petition.

19 U.S.C. § 1677e(b).

C.

Before reaching the question of whether Commerce's verification is supported by substantial evidence, we must determine whether Commerce reasonably applied the verification requirement imposed by section 1677e(b). That means we must review the verification process employed by Commerce and the results obtained therefrom. Briefly, the verification process in this case essentially consisted of reviewing financial information, gaining an understanding of computational methodologies, testing the mathematical accuracy of submissions, and tracing, on a test basis, submissions to company financial records.

Although it is clear that Commerce's reliance on the cost of production submissions was only proper if the information was verified, Congress has not further defined what successful verification under section 1677e(b) entails. Because the term "verification" itself is latently ambiguous, we turn for guidance to the Supreme Court's decision in *Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* holds that when, as here, a court does not find that "Congress has directly spoken to the precise question at issue" or that "the intent of Congress is clear," *id.* at 842–43, but does find that "the statute is silent or ambiguous with respect to the specific issue, the question for the

[13] Section 1677b(a)(2) sets forth the circumstances under which FMV may be the constructed value of the merchandise. None of the parties contend that it was not proper to seek to use constructive value in this case.

court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted); *see also Arbor Foods Inc. v. United States*, 97 F.3d 534, 538 (Fed. Cir. 1996) (articulating the *Chevron* standard). In antidumping cases, we acknowledge Commerce's special expertise and accord substantial deference to its construction of pertinent statutes. *See Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) ("In antidumping cases, we accord substantial deference to Commerce's statutory interpretation, as the International Trade Administration is the 'master' of the antidumping laws."). We also recognize that Commerce is afforded broad discretion with regard to the conduct of investigations. Commerce has "the discretionary authority to determine the extent of investigation and information it needs." *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (Fed. Cir. 1992).

We note first that Commerce has not formally defined verification requirements. The regulation implementing section 1677e(b) does not specify any methods, procedures, or standards for verification. It simply provides that:

> *Procedures for verification.* In verifying under this section, the Secretary will notify the government of the foreign country in which verification takes place that employees of the Department will visit with producers or resellers in order to verify the accuracy and completeness of submitted factual information. As part of the verification, employees of the Department will request access to all files, records, and personnel of the producers, resellers, importers, or unrelated purchasers which the Secretary considers relevant to factual information submitted.

19 C.F.R. § 353.36(c) (1996).

Recognizing the general nature of the regulation, Micron asks us to turn to the following sources to discern Commerce's administrative practice in this area:

> 1. *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 56 Fed. Reg. 31,692, 31,707 (Issues Appendix) (July 11, 1991) ("AFB").
> 2. Marie Parker and Lawrence Bogard, *Verification, in The Commerce Department Speaks on Import Administration and Export Administration* Vol. 1., at 163–80 (1984).

In AFB, which is a report of a LTFV investigation, Commerce, in explaining the verification process, states:

> Verification depends precisely on tying amounts reported in questionnaire responses to the company's internal accounting records and financial statements. Failure to demonstrate such a relationship results in a failed verification.

56 Fed. Reg. at 31,707. Similarly, in the second source, the authors—former Commerce employees[14]—note the importance of tracing costs set forth in a response to the respondent entity's financial statements through the accounting records kept in the ordinary course of business:

> Several basic concepts underly (sic] all verification procedures.
>
> 1. The reported items are traced through the company's books (prepared in the ordinary course of business prior to the investigation) to the audited financial statements (if available). * * *

Parker and Bogard, *supra.*

We agree with the government that the above sources should be viewed in context. In the case of AFB, Commerce resorted to the best information available because the unreasonable allocation methodology adopted by the plaintiff frustrated the cost verification process. *See Nippon Pillow Block Sales Co. v. United States,* 820 F. Supp. 1444,1447–49, *aff'd after remand,* 837 F. Supp. 434 (1993), *aff'd,* 34 F.3d 1078 (Fed. Cir. 1994). In that case, Commerce made clear that its practice is to try to work with the respondent to devise an appropriate allocation methodology, but that one could not be devised with respect to Nippon Pillow Block. 56 Fed. Reg. at 31,707. It is in that light that we read the statement from AFB that is quoted above. The statement, which amounts to an observation by Commerce in the setting of a particular investigation, "was not necessary to the resolution of the issue." *Molins PLC v. Textron, Inc.,* 48 F.3d 1172, 1189 (Fed. Cir. 1995) (Nies, J., dissenting). Accordingly, we view it as the equivalent of dicta. With respect to the Parker and Bogard article, because it merely presents the views of two former Commerce employees on the verification process, it does not carry the weight of a pronouncement by the agency.

Because we find that Commerce has not restricted itself by clarifying the verification requirement, we disagree with Micron's suggestion that our role is to determine if, in this case, Commerce fulfilled its own self-imposed obligations. We find that our role, instead, is to evaluate for reasonableness the way in which Commerce chose to interpret the verification requirement in conducting its investigation of HEI and LGS.

By requiring that Commerce report, on a case-by-case basis, the methods and procedures used to verify submitted information, Congress has implicitly delegated to Commerce the latitude to derive verification procedures ad hoc. Since "the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because [we] might have made a different determination were [we] empowered to do so." *Securities & Exchange Comm. v. Chenery Corp.,* 318 U.S. 80, 94 (1943).[15] Therefore, we review verification procedures employed by

[14] Marie Parker was formerly the Director of the Office of Accounting, Import Administration, Department of Commerce. Lawrence Bogard was formerly an attorney in the Office of the General Counsel, Department of Commerce.

[15] Our conclusion is consistent with the "general principle that agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources." *Torrington,* 68 F.3d at 1351.

Commerce in an investigation for abuse of discretion rather than against previously-set standards. *Cf. American Alloys, Inc. v. United States*, 30 F.3d 1469, 1475 (Fed. Cir. 1994) (noting that "the statute gives Commerce wide latitude in its verification procedures"); *Hercules, Inc. v. United States*, 673 F. Supp. 454, 469 (1987) ("The decision to select a particular methodology rests solely within Commerce's sound discretion."); *Kerr-McGee Chem. Corp. v. United States*, 739 F. Supp. 613, 628 (1990) ("Congress intended that ITA have latitude in its verification procedures and that it not be required to comply with all requests for specific types of investigation.").

Turning to the case before us, we agree with the government that the methodology of a spot check of HEI's and LGS's financial figures was reasonable. As recognized by Micron in its brief, "[i]t is *not* required that Commerce trace through every number of the response—a representative sample is sufficient." *Cf. Monsanto Co. v. United States*, 698 F. Supp. 275, 281(1988) ("Verification is a spot check and is not intended to be an exhaustive examination of the respondent's business."). We further note that it would be unrealistic to require a full-scale audit of the foreign entity. *Cf. Bomont Indus. v. United States*, 733 F. Supp. 1507,1508 (1990) ("[V]erification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness. Normally, an audit entails selective examination rather than testing of an entire universe."). As recognized by one commentator:

> While the anti-dumping statute unambiguously requires the ITA to verify "all" information processed by the constructed value calculations that are relied upon in making a final determination, this does not actually happen. Owing to the number of relevant issues and data points, the ITA does not, and cannot, perform the equivalent of a full-scale accounting audit of foreign respondents subject to verification. Instead, samples of suspicious data are verified until ITA accountants get a "feel" for whether data supplied by the U.S. complaintant or the foreign respondent is more accurate.

Tycho H.E. Stahl, *Problems with the United States Anti-Dumping Law: The Case for Reform of the Constructed Value Methodology*, 11 Int'l Tax & Bus. L. 1, 16 (1993) (citations omitted). Finally, in concluding that Commerce was not required to conduct full-scale audits of HEI and LGS, we are mindful of the statutory time constraints imposed on Commerce. *Cf. Monsanto*, 698 F. Supp. at 284 (noting in reference to verification that "[o]bviously, ITA must * * * fulfill a statutory directive to promptly complete these investigations").

In short, we decline to impose a requirement on Commerce to trace every figure it chooses to verify back to financial statements prepared in the ordinary course of business. Instead, we conclude that Commerce's ability to make such a trace is relevant to, but not dispositve of, a finding that substantial evidence supports the verification results. Commerce's verification process in this case comported with a permissible interpretation of the statutory requirement.

C.

Having found Commerce's interpretation of the verification requirement to be reasonable, we turn to the question of whether the verification results themselves are supported by substantial evidence. We first note that Micron bears the burden of proving the evidence inadequate, and though we speak in terms of analyzing whether the verification results are supported by substantial evidence, we will disturb the Court of International Trade's decision only if Micron proves that Commerce made an antidumping determination unsupported by substantial evidence. *See Atlantic Sugar,* 744 F.2d at 1559 n.10; Dorinda D. Bolander, *Survey of the Court of International Trade: Antidumping Actions of 1992,* 56 Alb. L. Rev. 1017, 1040 (1993). Preliminarily, we disagree with Micron's contention that the administrative record before us must contain the financial documents that would permit other parties to recreate Commerce's verification. *Cf. Bethlehem Steel Corp. v. United States,* 718 F. Supp. 70, 73 (1989) ("Although disclosure of confidential information is meant to aid in effective advocacy, petitioners' counsel are not empowered to act as independent investigators * * *. Petitioners should not attempt pure duplication of Commerce's function * * *." (citation omitted)). Because not all the documents reviewed in the verification process are made part of the record, *see Kerr-McGee Chem. Corp. v. United States,* 739 F. Supp. 613, 617 n.2 (1990) (noting that "all documents examined at verification are not ordinarily made part of the record"),[16] we look instead to whether a reasonable mind might accept the relevant evidence in the record as adequate to support the results of Commerce's verification. *See Hercules,* 673 F. Supp. at 469 ("When Commerce applies a reasonable standard to verify materials submitted and the verification is supported by such 'relevant evidence as a reasonable mind might accept,' the Court will not impose its own standard, superceding that of Commerce." (citing *Agrexco, Agric. Export, Co. v. United States,* 604 F. Supp. 1238, 1244 (1985))). Applying this standard, we find that a reasonable mind could find the evidence in this case adequate to support Commerce's verification results with respect to costs of production.

As far as HEI is concerned, Micron asserts that the verification report and accompanying exhibits prove not only that the verification is not supported by substantial evidence, but also that there is conclusive evidence that verification was not successful. Micron cites the verification of depreciation as illustrative. In the verification report, Commerce listed the procedures it used to verify depreciation as follows:

> 1. Reviewed summaries of adjustments made to depreciation expense. * * *
> 2. Performed reasonableness tests of depreciation summaries.
> 3. Reviewed depreciation summary for 1991 and 1992. Noted significant decrease in depreciation expense for machinery and equip-

[16] We note that Commerce is not required to make all of respondent's financial documents part of the record, but is only required to "disclosfe] its methods" of verification. *See China Nat'l Metals & Minerals Import & Export Corp. v. United States,* 674 F. Supp. 1482,1486 n.2 (1987).

ment in Fab line 2.[17] Noted that production remained constant during this time.

4. Traced depreciation amounts and the recorded values for machinery and equipment in Fab 3 to fixed asset ledger as of 4/30/92.

5. Traced adjusted depreciation amounts for January 1992 to the worksheets used to prepare cost information. * * *

6. Tested asset value for the clean room and structure related to Fab 3, constructed by a related company [Hyundai Engineering and Construction Company] to determine if the value represented a fair market value greater than the cost of production. Noted that amounts recorded by HEI did not include any costs related [to] the general expenses or interest expenses of [Hyundai Engineering]. * * *

With respect to steps 1, 4, and 5 above, Micron contends that the documents upon which Commerce relied are not source documents and that they were not reconciled against financial statements. Further, with respect to step 1, Micron notes that the relevant documents clearly show that the only depreciation expenses verified were those for machinery and equipment, and that other depreciation expenses, such as those for buildings, were not verified. Micron further asserts that, in Step 4, Commerce also referred to documents not "on the record," and that any conclusions based on such documents are not "supported by evidence on the record." Addressing steps 2 and 3, Micron cites to a lack of detail as to how depreciation summaries were tested for reasonableness and as to how the depreciation summaries for 1991 and 1992 were reviewed. Micron also cites to an alleged lack of detail concerning the results of these tests. Finally, as evidence that verification of depreciation was not successful, Micron points to step 6, noting Commerce's conclusion that the price paid by HEI for the clean room and the structure related to fabrication area 3 did not account for general and interest expenses of the related construction company. All of Micron's contentions lack merit, however, in light of the fact that Commerce did not use the financial information Micron now challenges, but instead, and pursuant to 19 U.S.C. § 1677e(b),[18] concluded that the submitted information was unreliable and "recalculated depreciation expense based upon BIA [best information available]."[19] Because Micron has raised no argument against Commerce's recalculation of HEI's depreciation expenses based upon BIA, and because Micron has not challenged Commerce's choice of BIA, there is no issue relating to depreciation expenses in dispute.

Micron also points to statements by Commerce and the Court of International Trade that Commerce "attempted" certain verification procedures with respect to HEI's costs of production. Thus, Micron urges us

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17 "Fab" refers to "fabrication area."

18 Section 1677e(b) provides, in pertinent part, that: "If the administering authority is unable to verify the accuracy of the information submitted [by the subject entities], it shall use the best information available to it as the basis for its action * * *." 19 U.S.C. § 1677e(b).

19 "[A]s BIA the Department calculated depreciation on the assets used in the manufacturing of the product under investigation based on the gross acquisition value less 10% salvage value over its useful life, four years for all assets related to wafer fabrication and R&D and six years for assets related to assembly and test."

to interpret an "attempted" verification as a failed one. Turning first to the common meaning of the word "attempt," we find that Webster's defines "attempt" as "to make an effort to do, accomplish, solve, or effect." *Webster's Third New International Dictionary* 140 (1986). Although Webster's also notes that the word "attempt" can be used to connote a failed attempt, *see id.* (noting that the word "attempt" is "often used in venturous or experimental situations sometimes with implications of failure"), it is clear that the term does not necessarily imply failure.

Although the dictionary definiton of "attempt" provides some guidance as to the interpretation of the term, we find further, more pointed guidance from the context in which the term appears. In that regard, the excerpt from the Court of International Trade opinion that is quoted by Micron in support of its argument reads as follows: "Because [HEI] normally maintains its records in a different form than that in which it submitted its cost of production information, Commerce chose to verify [HEI's] submitted information by *attempting* to tie it to information contained in [HEI's] ordinary business records." *Micron,* 893 F. Supp. at 40 (emphasis added). Micron followed the quotation from the court's opinion by noting that "[i]f Commerce merely *attempted* to tie the information in the response to [HEI's] ordinary business records, but *did not succeed,* then it did not 'verify' the response." Micron's statement, viewed in the abstract, is correct. A review of the context in which the court's statement appears, however, reveals that Micron is not correct in its articulation of the court's position. After the above-quoted exerpt, the Court of International Trade stated: "Indeed, substantial record evidence shows that Commerce *successfully tied* submitted information to information contained in (HEI's] business records for each major phase of DRAM production." *Id.*

Not only is Micron's interpretation of the word "attempt" in conflict with the context in which the word appears; it also contradicts Commerce's finding that verification was successful. Without evidence to the contrary, it is assumed that Commerce only used questionnaire reponses that Commerce believed were verified. *See Alaska Airlines, Inc. v. Johnson,* 8 F.3d 791, 795 (Fed. Cir. 1993) ("'[T]here is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations. * * *' * * * And this presumption stands unless there is 'irrefragable proof to the contrary.'" (quoting *Parsons v. United States,* 670 F.2d 164, 166, 229 Ct. Cl. 335 (1982) and *Torncello v. United States,* 681 F.2d 756, 770, 231 Ct. Cl. 20 (1982))). In addition, there is also record evidence to support the conclusion that Commerce was able to trace successfully the information upon which it relied. That evidence relates to research and development costs, general and administrative costs, and profit. Finally, Commerce itself notes that, where it could not verify properly the submitted information, it used the best information available. *See* 58 Fed. Reg. at 15,471 (cmt. 1) ("In those instances where we found insufficient verification support, we relied upon BIA.").

In arguing that the verification of HEI's costs is not supported by substantial evidence, Micron additionally cites: (1) Commerce's statements in the verification report that it was "unable to reconcile" certain account balances, and (2) Commerce's further statement in the verification report that it "could not rely on [HEI's] financial statements to confirm the product specific [costs of production] presented in its submission" and that it was "unable to trace reported individual product costs to company documents prepared in the ordinary course of business."

We believe that Micron misconstrues Commerce's statement that it was unable to trace data or reconcile certain account balances. At the public hearing subsequent to the verification, Commerce made it clear that the concerns expressed in the verification report that are quoted by Micron did not represent final conclusions:

> This is an attempt to highlight issues about which the Department is concerned once it completes its initial examination of the information available to it from the verification. It is not a decision. Explicitly, it is not a decision. Secondly, and more importantly, it is an attempt to give parties an opportuntity to understand, and subsequently comment on, those things about which the Department is concerned. It is, in effect, a heads up call. Although the language that follows portions of these write-ups appear to be conclusory, I think it's very important that everyone understand that each of these is merely an effort on our part to say these are the issues about which we are concerned. *It is not an effort to say these are decisions that we have made. And I think that needs to be explicitly clear for the record.*

Finally, with respect to Commerce's statement that it was not able to trace costs to company source documents, the government correctly points out that the statement was not meant to describe a failure of verification, but, rather, related to the fact that HEI's normal cost accounting system prepared unit cost information on a semi-annual basis, while its cost response reported information on a monthly basis. To prepare cost submissions, HEI was required to draft worksheets detailing the company's allocation of costs. The statement at issue simply reflects that fact. In sum, we uphold the court's decision that Commerce's reliance on HEI's submitted cost information was proper.

Moving to LG Semicon, Micron contends that Commerce was not able to trace a crucial element of LGS's costs of production: Beginning Work in Process ("BWIP") for each quarter covered by the period of investigation (November 1, 1991, through April 30, 1992). In the course of the verification process, Commerce asked LGS to provide sample cost calculations relating to costs of production for two specific DRAM models—the 1 megabit ("1M") and 4 megabit ("4M") chips. LGS complied with the request, providing cost information relating to the various stages of chip development. Where possible, the cost information, which was computed on a quarerly basis, was broken down to indicate costs associated with the 1M and 4M chips. Micron contends that the manner in

which the BWIP costs were presented tended to understate the costs of production.

The BWIP figure represents—at the beginning of a given quarter—the value of the DRAMs that have begun the production process but have not yet been completed. The overall cost of production for DRAMs completed during the quarter is calculated by starting with the BWIP figure, adding to it the value of the inputs during the quarter—material, labor, overhead—and subtracting from it the Ending Work in Process ("EWIP"). EWIP is equal to the BWIP at the beginning of the next quarter and therefore relates to DRAMs completed during the next quarter. Thus, Cost = BWIP + Input – EWIP. If BWIP is underestimated, as Micron contends, the cost of production for each quarter will also be understated.

To support its contention that the BWIP figures being reviewed were inaccurate, Micron directs our attention to an alleged discrepancy between cost information appearing in two different sources. We conclude, however, that the appearance of a discrepancy exists because the figures in the first source represent the total BWIP figures for all production stages, whereas the figures in the second source represent financial information relating to only one production stage—the wafer fabrication stage. After examining costs of production by taking into consideration the fact that certain figures are not broken down by product line and that other figures represent only specific production stages, we are able to reconcile the BWIP figures. Our ability to reconcile the BWIP numbers belies Micron's attempt to prove that substantial evidence does not support Commerce's reliance on the BWIP data.

After a careful and thorough review of the record, we are satisfied that Commerce's reliance on LGS's costs of production is supported by substantial evidence. Although the record may not present a paragon of clarity, we find that it contains a sufficient basis upon which to affirm the Court of International Trade's decision. *See Ceramica Regiomontana, SA. v. United States,* 810 F.2d 1137, 1139 (Fed. Cir. 1987) (noting that a court may "'uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned.'" (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974)) (alteration in original)).

CONCLUSION

For the foregoing reasons, the decision of the Court of International Trade is affirmed.

COSTS

Each party shall bear its own costs.

AFFIRMED

UNITED STATES SHOE CORP., PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 96–1210

(Decided June 3, 1997)

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Appealed from: United States Court of International Trade.
Senior Judge DICARLO.

Before MAYER, MICHEL, RADER, and BRYSON, *Circuit Judges*, and SMITH, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* MICHEL. Dissenting opinion filed by *Circuit Judge* MAYER.

MICHEL, *Circuit Judge.*

The United States ("the government") appeals from the December 4, 1995 decision of the United States Court of International Trade granting summary judgment to United States Shoe Corporation ("US Shoe") and holding that the court possessed jurisdiction over this case pursuant to 28 U.S.C. § 1581(i), not 28 U.S.C. § 1581(a), that the Harbor Maintenance Tax ("HMT") violates the United States Constitution and is therefore void as applied to exports. *See United States Shoe Corp. v. United States,* 907 F. Supp. 408 (Ct. Int'l Trade 1995). The case was submitted for our decision after oral argument by the parties before a five-judge panel on February 7, 1997, following briefing not only by the parties but also by numerous amici. The Court of International Trade correctly exercised jurisdiction under 28 U.S.C. § 1581(i) and correctly concluded that the HMT violates the Export Clause, U.S. Const., Art. 1, § 9, cl. 5, because it is a tax on exports rather than a user fee. The HMT, as applied to exports, is not a user fee but rather a tax because it is paid by the exporter, not the direct user of the harbor, and is calculated solely based on the value of the cargo loaded for export and bears no reasonable relationship to the cost of the use of the port facilities maintained by the government and therefore cannot be a fair approximation of use. We therefore affirm the judgment invalidating the HMT as applied to exports and ordering a refund to US Shoe.

BACKGROUND

The HMT was imposed by Congress as part of the Comprehensive Water Resources Development Act of 1986 ("the Act"), Pub. L. No. 96–622, 100 Stat. 4082 (codified at 26 U.S.C. § 4461). The Act also established the Harbor Maintenance Trust Fund ("the Trust Fund") to provide for the operation and maintenance of channels and harbors. The details of the HMT, the Act, and the Trust Fund relevant to this lawsuit are set forth in the trial court's opinion and are not repeated here in detail. *See United States Shoe,* 907 F. Supp. at 411–12.

In short, the Act imposes an *ad valorem* tax of 0.125 percent of the value of the commercial cargo involved in "any port use" of federally maintained navigable waterways. 26 U.S.C. §§ 4461, 4462(a)(2) (1994). The HMT is imposed on both exports and imports. As it specifically applies to exports, the HMT statute provides:

> (a) General rule.—There is hereby imposed a tax on any port use.
> (b) Amount of tax.—The amount of tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
> (c) Liability and time of imposition of tax.—
>
> (1) Liability.—The tax imposed by subsection (a) shall be paid by—
>
> * * * * * * *

> (B) in the case of cargo to be exported from the United States, the exporter. * * *
>
> (2) Time of imposition.—Except as provided by regulations, *the tax imposed by subsection (a) shall be imposed—*
>
> (A) *in the case of cargo to be exported from the United States, at the time of loading* * * *.

26 U.S.C. § 4461 (1994) (emphasis added). The term "port use" is defined as "the loading of commercial cargo on, or * * * the unloading of commercial cargo from, a commercial vessel at a port." 26 U.S.C. § 4462(a)(1) (1994). The term "port" is defined as "any channel or harbor (or component thereof) in the United States, which * * * (i) is not an inland waterway, and (ii) is open to public navigation." 26 U.S.C. § 4462(a)(2)(A) (1994). The term "commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire," but does not include "bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or * * * fish or other aquatic animal life caught and not previously landed on shore." 26 U.S.C. § 4462(a)(3) (1994). Thus, although there are certain exemptions, the tax is generally imposed against all imports, exports, domestic shipments, and passengers. *See* 26 U.S.C. §§ 4461(c)(1), 4462(a)(3)(A) (1994).[1] Money collected pursuant to the Act is transferred by Customs to the Trust Fund for disbursal upon further appropriation by Congress. *See* 26 U.S.C. § 9505(b) (1994). The fees were designed to finance the cost of harbor dredging. *See* S. Rep. No. 99–126 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647. By the end of fiscal year 1994, the total amount of fees collected and deposited in the Trust Fund was over 2.7 billion dollars, of which over 700 million dollars was paid by exporters.

Although the HMT was first enacted in 1986, there were no constitutional challenges until recently. US Shoe paid the HMT on articles exported for the period April 1 through June 30, 1994. US Shoe then brought suit in the Court of International Trade for the refund of these payments on the ground that the HMT, as applied to exports, is unconstitutional. In January 1995, given the large number of pending lawsuits challenging the constitutionality of the HMT[2], the Court of International Trade established a three-judge panel and heard this case as a test case. *See* 28 U.S.C. § 255 (1994) (authorizing the chief judge of the Court of International Trade to designate a three-judge panel to hear cases raising the constitutionality of any Act of Congress or which have broad or significant implications in the administration or interpretation of customs laws).

The parties filed cross-motions for summary judgment and, on October 25, 1995, the trial court issued its decision granting US Shoe's mo-

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[1] For passengers the tax is calculated based on the charge assessed for transportation. *See* 26 U.S.C. § 4462(a)(5)(B) (1994).

[2] As of the summer of 1996, there were approximately 2400 complaints pending in the Court of International Trade, as well as approximately 40 complaints pending before the Court of Federal Claims and one complaint pending in district court. The great majority of these lawsuits have been stayed pending the outcome of this appeal.

tion for summary judgment. *United States Shoe*, 907 F. Supp. at 408. The trial court first concluded that the HMT was unconstitutional as applied to exports because it constituted a tax, rather than a user fee, as it did not have regulation as its primary purpose and it did not recoup the costs of services provided to the payor. *Id.* at 413–18. Specifically, the trial court noted that "the Act neither discourages nor regulates use of a harbor; neither does it so intend." *Id.* at 413. The trial court also found that "the primary purpose of the [HMT] is to raise revenue, as Congress has imposed 'a duty under the pretext of fixing a fee.'" *Id.* at 414 (citation omitted). The trial court further determined that jurisdiction was not properly based on 28 U.S.C. § 1581(a), because there was no decision of Customs to protest. *Id.* at 418–21. In part, the trial court relied on the fact that "Customs does not determine the application, policies, or rates of the [HMT], but merely serves to implement its provisions." *Id.* at 420. Rather, the trial court held jurisdiction was properly based on 28 U.S.C. § 1581(i) because Congress directed that the HMT be treated as a customs duty and because customs duties, by their very nature, provide for revenue from imports. *Id.* at 421. The Court of International Trade enjoined the government from assessing and collecting the HMT and ordered the parties to file a proposed judgment.

The government appealed, urging that we hold that jurisdiction over these disputes is only proper pursuant to 28 U.S.C. § 1581(a) and that the HMT is constitutional. We heard this case as a five-judge panel pursuant to Local Rule 47.2, which states that "appeals in cases from the Court of International Trade decided by a three-judge court pursuant to 28 U.S.C. § 255 will ordinarily be referred to a panel of five judges." Fed. Cir. R. 47.2.

ANALYSIS

We "review the summary judgment in this case 'for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist.'" *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993) (quoting *Guess? Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991)). Here, the parties do not dispute any facts, but only dispute questions of law relating to the proper interpretation of the jurisdictional statutes and the constitutionality of the HMT as applied to exports.

I.

The parties do not dispute that the Court of International Trade possesses exclusive jurisdiction over this type of matter seeking a refund of HMT pursuant to 28 U.S.C. § 1581, in light of Congress' provision that "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2) (1994). The only dispute is whether subsection (a) or subsection (i) of section 1581 applies. The dispute exists because subsec-

tion (a) requires that the exporter first file a protest and limits recovery to amounts protested within 90 days of payment, while subsection (i) states only that the action must be initiated within two years of the date on which the cause of action accrued. Thus, if jurisdiction can only be had pursuant to subsection (a), the trial court did not have jurisdiction over US Shoe's complaint, as it is undisputed that US Shoe did not file a timely protest of the HMT payments at issue.

The relevant statutory subsections provide as follows:

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.
>
> * * * * * * *
>
> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section. * * *

28 U.S.C. § 1581 (1994).

A.

Although admitting that it does not fit perfectly, the government argues that subsection 1581(a) nevertheless confers jurisdiction over this dispute. The government argues section 1581 (a) is the "established route" for obtaining judicial review of duties, charges, and exactions imposed by Congress. As Congress envisioned that the HMT would be treated like a duty, the government argues jurisdiction under this subsection is the only logical result. The government admits, as it must, that subsection (a) requires that prior to the time an exporter can seek judicial review, Customs must issue a decision, the decision must be protested, and the protest must be denied. *See* 19 U.S.C. §§ 1514 (stating that decisions of the Customs Service are final unless a protest is filed), 1515 (stating that all protests will be reviewed within two years of filing). The government argues that the relevant "decision" is Customs' acceptance of the exporter's payment. In support, the government points to a generic regulation suggesting that the date of exaction (the date of payment) constitutes a protestable event. *See* 19 C.F.R. § 174.12(e) (1996) ("Protests shall be filed * * * within 90 days after * * * [t]he date of the decision, involving neither a liquidation nor reliquidation, as to which the protest is made (e.g., the date of an exaction

* * *."). According to the government, this regulation eliminates any confusion regarding the availability, timing or other procedures applicable to a protest and over 1000 HMT protests have been received by Customs pursuant to this regulation.

Relying on legislative history, US Shoe responds that Congress directed that the HMT be treated like a duty so that the Court of International Trade, with its expertise in international trade matters, would have jurisdiction over any disputes and so as to facilitate Customs' collection and processing of the HMT. *See* H. Rep. No. 99–228 at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714–15 ("In order to facilitate administration and collection of the port user charges [i.e., the HMT] by the U.S. Customs Service, * * * all administrative and enforcement provisions * * * are to apply * * * as if such charges were customs duties."). Thus, according to US Shoe, it is not clear that Congress intended for jurisdiction over this type of dispute to fall within a particular subsection of section 1581, and there is no evidence that Congress intended to amend the requirement of 19 U.S.C. § 1514 that there must be a Customs "decision" before filing a protest. US Shoe further argues that acceptance of payment is not a protestable decision and that therefore subsection (a) cannot apply.

We find US Shoe's arguments persuasive. Subsection (a) is not directly applicable because it applies to suits commenced to contest the denial of a protest. Decisions of the Customs Service are final unless a protest is filed. 19 U.S.C. § 1514(a) (1994). Decisions can refer to, for example, "the classification and rate and amount of duties chargeable" or "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." *Id.* While the HMT is likely a charge or exaction, we do not believe that the actual payment or receipt of the HMT can be a "decision" of Customs, as Customs has not made any decision—it merely passively collects money in the amount required by the statute. Customs doesn't even notify exporters of the need to pay the HMT; rather, the exporter pays all accumulated fees on a quarterly basis by simply mailing a check or money order to Customs along with appropriate forms. *See* 19 C.F.R. § 24.24(e)(2)(ii) (1996).

Typically, "decisions" of Customs are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty. Indeed, prior case law indicates that Customs must engage in some sort of decision-making process in order for there to be a protestable decision. Thus, for example, in *Dart Export Corp. v. United States*, 43 CCPA 64 (1956), one of our predecessor courts held that Customs' acceptance of estimated duties paid by an importer upon entry did not constitute a final, protestable decision which would deprive the government of the right to liquidate the entry at a later date, because the payment was based entirely on information provided by the importer, rather than after analysis and adjudication by Customs. *Id.* at 69–70, 74. Likewise, here, the HMT is based entirely on the exporter's information and calculation.

See 19 C.F.R. § 24.24(e)(2)(i) (1996). Specifically, this regulation provides that:

> [W]hen cargo is loaded on a commercial vessel for export at a port within the definition of this section, the exporter of that cargo (the name that appears on the SED or equivalent document authorized under 15 CFR 30.39(b)) is liable for the payment of the port use fee at the time of loading. The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation.

Id. Thus, Customs merely passively collects payments calculated by the exporters pursuant to statutes and regulations and performs no active role whatsoever. It performs no analysis; it issues no directives or decisions; it imposes no liabilities.

Similarly, in *Mitsubishi Elec. Am., Inc. v. United States,* 44 F.3d 973 (Fed. Cir. 1994), this court held that the Court of International Trade lacked jurisdiction over Mitsubishi's complaint under section 1581(a) because the Customs Service did not make any antidumping "decisions" as Customs merely followed the Department of Commerce's instructions in assessing and collecting specified duties. *Id.* at 977. The court pointed out that Customs' role was merely ministerial and that Customs did not determine the rate or amount of the antidumping duties. *Id.* Commerce actually conducted the antidumping duty investigation, calculated the antidumping duties, and issued the antidumping order; Customs merely collected the estimated duties. *Id.* at 976. Likewise, here, there was nothing for Customs to decide, because all substantive particulars regarding the imposition and amount of HMT are established by Congress. The amount of the HMT (0.125 percent of the value of the commercial cargo) is set by statute, 26 U.S.C. § 4461, and the exporter performs the calculation, 19 C.F.R. § 24.24. Customs is merely collecting the HMT in the amount and manner specified by Congress. Thus, there is simply no decision that US Shoe could have protested, or should have been required to protest, in order to allow the Court of International Trade to hear this dispute.

Norfolk & W. Ry. v. United States, 843 F. Supp. 728 (Ct. Int'l Trade 1994), *aff'd,* 62 F.3d 1395 (Fed. Cir. 1995), relied on by the government, is not to the contrary. There, a railroad company brought an action challenging user fees collected on vehicles and vessels entering the United States. *Id.* at 729. The railroad company filed a user fee refund request with the Secretary of the Treasury on the grounds that its railroad barges were not ferries and that, as barges, they were subject to a cap on user fees. *Id.* at 730. The refund request was granted. However, several years later, Customs informed the railroad company that its barges were indeed ferries and not subject to the cap. *Id.* The court concluded that the user fees were charges subject to protest and that jurisdiction fell under 1581(a). *Id.* at 732–33 ("The user fees at issue in this case are clearly 'charges' within the meaning of § 1514(a) and, therefore, are subject to protest under this subsection."). A careful reading of this case,

however, makes clear that the user fees were protestable charges because there had been a specific decision by Customs applying statutory definitions that certain vessels were ferries rather than barges, thus subjecting the cargo to user fees. *Id.* at 730, 733. There, Customs was authorized to collect certain user fees on vehicles and vessels entering the United States. *Id.* at 729. The Railway transported railroad cars on barges into the United States from Canada. *Id.* The amount of fees due varied based on whether the barge was considered a ferry or not. The Railway was notified by Customs that it was required to pay a $7.50 user fee for each of the railroad cars, but no fees for its barges because Customs considered the barges to be ferries. *Id.* at 730. The Railway filed a protest of that decision. There is no comparable analysis and decision here. This is not a case where, for example, US Shoe contended its exports fell within one of the HMT exemptions and Customs decided to the contrary.

We therefore hold that because the collection of the HMT does not involve a protestable decision on the part of Customs, the trial court correctly concluded that jurisdiction over this dispute did not arise under 28 U.S.C. § 1581(a). In light of this holding, we need not reach US Shoe's additional arguments that any protest it might have filed would have been futile or manifestly inadequate.

B.

Given that the Court of International Trade did not possess jurisdiction under 28 U.S.C. § 1581(a), if it possessed jurisdiction over this dispute, as the government concedes that it did, it can only have been pursuant to the default provision, 28 U.S.C. § 1581(i). The government argues subsection 1581(i) cannot apply because that subsection provides for jurisdiction in only those limited circumstances when jurisdiction under any of the other subsections is unavailable or manifestly inadequate. However, this is no bar to jurisdiction here because jurisdiction under the other subsections, specifically subsection (a)—the only other arguable possibility—is unavailable. The government also argues that, by its own terms, subsection 1581(i) applies only to imports, not to exports.

We do not agree. As US Shoe persuasively argues, the Court of International Trade properly exercised its jurisdiction under 28 U.S.C. § 1581(i). Congress expressly directed that for jurisdictional, administrative and enforcement purposes, the HMT was deemed to be a customs duty. Thus, it is beyond dispute that Congress intended the Court of International Trade to have jurisdiction over disputes regarding the HMT, as the Court of International Trade has exclusive jurisdiction over customs matters. Moreover, there is no argument made by either US Shoe or the government that the Court of International Trade can exercise jurisdiction over this dispute pursuant to any statute other than 28 U.S.C. § 1581. As discussed above, subsection 1581(a) does not apply. The only other credible, and indeed the only other argued, possibility is subsection 1581(i). Admittedly, subsection (i) does not specifically refer

to disputes concerning the constitutionality of fees such as the HMT. It does, however, specifically refer to the "administration and enforcement with respect to the matters referred to in" the preceding paragraphs, including any law providing for revenue from imports. This dispute does involve the "administration and enforcement" of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports. Additionally, the mere fact that subsection 1581(i) does not speak precisely to this issue and does not use the word "exports" is not dispositive, as it "was intended to give the Court of International Trade *broad residual authority* over civil actions arising out of federal statutes governing import transactions * * *." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994) (emphasis added).

Thus, in light of the fact that the HMT is a law providing for revenue from imports (as well as exports) and the fact that subsection 1581(i) grants broad residual authority concerning import transactions to the Court of International Trade, the trial court properly asserted jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(i). We must therefore consider whether the trial court correctly held that the HMT, as applied to exports, is unconstitutional.[3]

II.

The United States Constitution provides that:

> No Tax or Duty shall be laid on articles exported from any State.

U.S. Const., Art. I, § 9, cl. 5. The Supreme Court recently analyzed the Export Clause in *United States v. International Bus. Mach.* ____ U.S. ____ 116 5. Ct. 1793 (1996). There, the Supreme Court held that the Export Clause does not permit "the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit." *IBM*, 116 S. Ct. at 1795. In other words, even those taxes that are imposed equally on exports and imports or other articles of commerce are prohibited by the Export Clause. *See Id.* at 1803. ("The better reading [of the Export Clause], that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by *completely* denying to Congress the power to tax exports at all.") (emphasis added). Thus, if the HMT is a tax on goods in export transit, it is invalid. We address first whether the HMT is a tax and second whether the HMT is imposed on goods in export transit.

A.

The HMT statute provides:

> (a) General rule.—There is hereby imposed a *tax* on any port use.
> (b) Amount of *tax*.—The amount of *tax* imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
> (c) Liability and time of imposition of *tax*.—
> (1) Liability.—The *tax* imposed by subsection (a) shall be paid by—

[3] We need not and do not address the constitutionality of the HMT statute as applied to anything except exports.

* * * * * * *

(B) in the case of cargo to be exported from the United States,the exporter. * * *

(2) Time of imposition.—Except as provided by regulations, the *tax* imposed by subsection (a) shall be imposed—

(A) in the case of cargo to be exported from the United States, at the time of loading * * *.

26 U.S.C. § 4461 (1994) (emphasis added). Thus, this statute, at least as it applies to exports, appears to be a prohibited tax on exports in that the tax is imposed based on the value of the exported goods and accrues at the time the goods are loaded on a ship for export. Although the legislative history refers to the HMT as a user fee, the statute itself repeatedly refers to the HMT as a tax and is codified in the Internal Revenue Code.

The government, however, argues that the fact that the HMT is referred to as a tax is not dispositive and that the HMT is actually a user fee, not a tax. The test used to distinguish between taxes and user fees was first articulated in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines,* 405 U.S. 707 (1972), and more recently applied in *Massachusetts v. United States,* 435 U.S. 444 (1978). That test states that user fees are valid as such so long as they: (1) do not discriminate against the constitutionally protected interest (here, exports); (2) are based on a fair approximation of use; and (3) are not excessive in relation to the cost to the government of the conferred benefits. *See Massachusetts,* 435 U.S. at 464. We need not decide whether the HMT discriminates against exports or is excessive in relation to the cost to the government of the conferred benefits. Instead, we discuss only whether the HMT is based on a fair approximation of use.

US Shoe argues, and the trial court held, that the HMT is not a fair approximation of the cost of the benefits received by exporters because there is no correlation between the amount of HMT an exporter pays and the amount the exporter uses the port. In other words, the amount of the HMT has no relationship to the size or weight of the vessel or the necessary depth of the port required by the vessel. For example, "[l]ow value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters." *US Shoe,* 907 F. Supp. at 415. Yet, even though the bulk cargo exporters generally require a larger vessel and a deeper port, and therefore "use" the port to a greater extent, they pay a lower tax than high value, low bulk cargo exporters. Moreover, a ship that docks but does not load or unload cargo is not required to pay a fee, even though that ship otherwise utilizes the port. Additionally, there is apparently no correlation between the amount of fees collected at a particular port and the expenditure of funds from the Trust Fund to maintain that particular port. Indeed the trial court found that "most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures." *Id.* Finally, it is not consistent with a true user fee that so many users are exempted, such as those carrying bunker fuel, ship's stores,

equipment necessary for the operation of the vessel and fish and other aquatic animal life not previously landed on shore, 26 U.S.C. § 4462(a) (1994), since ships carrying these products use the port facilities to the same extent as ships carrying products subject to the HMT.

The government argues that the HMT is based on a fair approximation of use and, in support, relies on other cases in which similar *ad valorem* user fees have been upheld. The government first relies on *United States v. Sperry Corp.*, 493 U.S. 52 (1989), where the Supreme Court held that a user fee of 1.5% of all awards recovered from the Iran-United States Claims Tribunal was not an unconstitutional taking but a valid user fee. There, Sperry had argued that the fee could not be a user fee because it did not bear any relationship to the cost of the tribunal to the United States or the value of the tribunal to Sperry. *Id.* at 60. In rejecting this argument, the Court stated that a user fee need not be "precisely calibrated to the use that a party makes of government services" and need only be a "fair approximation." *Id.* The Court also recognized that, where user fees are applied to a large number of parties, some users will be charged more and some less than In a perfect user-fee system. *Id.* at 61. Here, the government argues that, as in *Sperry,* the fact that the benefits received do not exactly correspond to the amount of the HMT does not render the HMT statute unconstitutional.

We do not find *Sperry* dispositive for two reasons. First, unlike the present case, in *Sperry* the person receiving the award and paying the fee was the direct beneficiary of the process for which they were paying. In other words, parties that had their claims adjudicated by the tribunal or otherwise received the benefit of the tribunal were required to pay the costs of establishing and maintaining the tribunal. Here, on the other hand, as applied to exports, the direct users—the ship owners—do not contribute to the maintenance of the port and it is only indirect users—the export companies—that are required to pay the HMT. Second, the *Sperry* Court, in distinguishing a case holding registration and axle taxes unconstitutional as a violation of the Commerce Clause, stated that the standard applied under the Just Compensation Clause was less strict than that which would be applied in a Commerce Clause analysis where one is concerned about discrimination against interstate commerce. *Id.* at 61 n.7. To this we would add that, per *IBM,* the Export Clause is still more restrictive. *See IBM,* 116 S. Ct. at 1799 ("Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the Export Clause is equally fluid. At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.") (footnote omitted).

The government also relies on *Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.,* 906 F.2d 516 (11th Cir. 1990), where the Eleventh

Circuit concluded that an airport access fee enacted to provide funds to maintain the airport and based on a rental car company's gross business receipts was a valid user fee. Alamo argued the fee was not a fair approximation because it bore no relation to Alamo's use of the airport and instead varied in proportion to the revenue generated by Alamo's customers. *Id.* at 520. Alamo argued that its only use of the airport was to drive on the airport roads to pick up customers and that its fee should be limited to a pro rata road use fee. *Id.* at 519. The court disagreed, reasoning as follows:

> Although imprecise in particular applications, the Authority's decision to measure Alamo's use of the airport facility by the gross receipts generated from Alamo's airport customers is not irrational. The Authority could reasonably conclude that the ten percent fee on average represents Alamo's use of the airport facility. It stands to reason that *in general* the more money Alamo makes from airport passengers, the more trips Alamo has made to the airport.

Id. at 520 (emphasis added). Thus, while imprecise, the fee was not unfair or irrational, but was instead a "fair approximation." Again, the payer of the fee in *Alamo* was the direct beneficiary of the use of the airport, unlike here where the exporter is not the direct beneficiary and is not assured harbor maintenance at the harbor where the exporter's goods are loaded. Moreover, in rejecting Alamo's argument that the fee was unreasonable because it was required to pay a greater fee for a person who rented a car for seven days than for a person who only rented a car for one day even though each individual made equal use of the airport, there the court found that the 10% fee was acceptable because it represented, on average, Alamo's use of the airport. *Id.* Here, there is no such finding that the HMT represents, on average, an exporter's use of the port and, as discussed above, the court concluded that the HMT was not based on a fair approximation of use, thereby implicitly finding that the HMT did not represent, on average, an exporter's use of the port.

The government also argues, without providing any support, that by using the words "fair approximation of use" the Supreme Court in *Massachusetts* intended to refer to the *value* of the benefits received, rather than the *costs* of the benefits received. The government then asserts that the HMT is a fair approximation of the value of the benefits received because the profitability of higher value cargo is higher than for lower value cargo. We do not agree. First, the *Massachusetts* case itself suggests that the cost of the benefits, rather than the value, is the appropriate measure in its statements that "Congress believed that four measures, taken together, would fairly reflect some of the *cost* of the benefits" and "the present scheme nevertheless is a fair approximation of the *costs* of the benefits each aircraft receives." 435 U.S. at 468 (emphasis added). Second, higher value merchandise does not always correlate to a higher profit margin and the government has failed to present any facts that would suggest that, even on average, this is the case. Thus, exporters of higher value goods do not necessarily receive a great-

er benefit, even in terms of value, than exporters of lower value goods. Third, the exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use. Fourth, the HMT does not pay for services, such as police, fire or rescue units, that provide benefits to the exporters by keeping the harbors safe whether the exporters use those services or not. *See Maine v. Department of Navy* 973 F.2d 1007, 1014 (1st Cir. 1992) (refusing to grant summary judgment that fee used to pay for a hazardous waste spill response team was not based on a fair approximation of use because, even though the Navy, had not yet needed the team, it was available to minimize any future spill at the shipyard).[4] Therefore, even if the value of the benefits received is an accurate measure, we hold that the HMT is not a fair approximation of the value of the benefits received by the exporters.

We therefore hold that the HMT is not based on a fair approximation of use and, as such, is not a permissible user fee. Although the decision to impose the HMT on an *ad valorem* basis may have substantially reduced administrative costs and burdens, it is nevertheless not based on a fair approximation of use. Since the HMT is not a valid user fee, it must be a tax.

B.

The government also argues the HMT is not levied against exported articles and, therefore, even if it is a tax, it is not unconstitutional. Rather, according to the government, the fee is imposed on the use of federally maintained harbors by shippers,[5] exporters[6] and importers[7] of commercial cargo, regardless of destination, and is even imposed on the transportation of passengers. Thus, according to the government, the HMT is "an ordinary burden of taxation" rather than a tax or duty imposed on "exported articles."

We do not agree. The Constitution prohibits taxation of articles in the course of being exported. *See A.G. Spalding & Bros. v. Edwards,* 262 U.S. 66, 69 (1923) ("The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was 'laid on articles exported from any State,' because that is forbidden in terms by the Constitution."). Thus, while a tax may be constitutional if imposed on goods during the manufacturing process, even if they are intended for later export, a tax is not constitutional if imposed on those very same goods after they are loaded on a vessel for export or if imposed when delivered to the carrier for export. *See Id.* (holding unconstitutional a tax on baseball bats and balls imposed on "[t]he very act that

[4] Notably, in this case the appellate court rejected the Navy's argument that the measure of the authorized fee for services is the value to the recipient. *See Maine,* 973 F.2d at 1014.

[5] Shippers, i.e., the persons or corporations that pay the freight, are responsible for paying the HMT on commercial shipments within the United States. *See* 19 C.F.R. § 24.24(e)(1)(i) (1996).

[6] Exporters, i.e., the persons or corporations whose name appears on the SED document or the equivalent document, are liable for the HMT on exports. *See* 19 C.F.R. § 24.24(e)(2)(i) (1996).

[7] Importers are liable for the HMT on imports. *See* 19 C.F.R. § 24.24(e)(3)(i) (1996).

passed the title and that would have incurred the tax had the transaction been domestic, [and that] committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods."). Here, the HMT is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel, rather than at some prior point in time when the goods are not yet bound for export. The exporter, rather than the manufacturer, pays the tax. In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(a), and is based on the value of the goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A). *See also* 19 C.F.R. § 24.24(e)(2)(i) ("The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation."). Thus, we conclude that the HMT, as applied against US Shoe, is imposed on exports.

C.

The government makes several additional arguments in support of the constitutionality of the HMT. First, the government argues that the Export Clause is distinct from the Commerce Clause and, consequently, Congress may impose a tax or duty pursuant to its authority to regulate commerce, so long as the purpose of the tax or duty is not to raise revenue for the general welfare. *See Armour Packing Co. v. United States,* 209 U.S. 56, 79 (1908) ("But it is to be observed that the Constitution provides for a burden only by the way of taxation or duty, and, unless the alleged interference amounts to such taxation or duty, it does not come within the constitutional prohibition."). Thus, according to the government, the relevant inquiry is whether the HMT was enacted pursuant to Congress' authority to regulate commerce, not whether it imposes a burden on exports. *See New Orleans Steamship Ass'n v. Plaquemines Port, Harbor and Terminal Dist.,* 874 F.2d 1018, 1021–22 (5th Cir. 1989) (holding that a port could impose reasonable fees against ships to finance emergency response services). Second, the government argues that the trial court adopted an overly broad interpretation of the Export Clause because it failed to recognize that the sole purpose of the Export Clause was to prevent the northern states from crippling the export-dependent southern states—not to restrict Congress' authority to impose nondiscriminatory fees designed to recoup costs.

We do not agree. The Supreme Court recently reaffirmed the breadth of the Export Clause in the face of the argument that its historical purpose justified a narrow construction. *IBM,* 116 S. Ct. at 1803 ("While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language."). Moreover, the power to regulate commerce cannot completely override the ef-

fect of the Export Clause. *See North Am. Co. v. SEC*, 327 U.S. 686, 704–05 (1946) ("This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as section 9 of Article 1 and the Bill of Rights."); *see also IBM* 116 S. Ct. at 1798 (rejecting government's request to "reinterpret the Export Clause to permit the imposition of generally applicable, nondiscriminatory taxes as [the Court has] under the Commerce Clause * * *."). It is undeniable that Congress may regulate commerce by means such as encouraging or discouraging certain actions using regulatory charges to achieve compliance. *See South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) (imposition of a 50–cent deduction on proceeds of all milk sold commercially is constitutional where "[t]he clear language and structure of the [statute] indicates that its primary purpose is regulation" and the "purpose is to reduce overproduction of milk and shift some of the financial burden of the price support system."). Likewise, it is beyond dispute that Congress may raise money to recover the expenses of a regulatory program. *See, e.g., New Orleans*, 874 F.2d at 1021–22 ("[C]ourts have consistently held that ships may be made to pay for services they get.").

It is, however, also beyond dispute that Congress cannot merely impose a direct economic burden on merchandise for export in the absence of regulation. *See IBM*, 116 S. Ct. at 1798–99 (rejecting the government's argument that the Commerce, Import-Export and Export Clauses should be read in harmony to permit the imposition of generally applicable, nondiscriminatory taxes on exports). That is the case here. The government has failed to point to any indication that the HMT is intended to regulate commerce. Indeed, it appears that the HMT regulates nothing. It is not designed to reduce the overall use of the ports. *See Block*, 717 F.2d at 887. Rather, the HMT merely increases the cost of exporting by raising money to maintain the harbors in a manner that is not reasonably connected to the exporter's use of the harbors, and is therefore unconstitutional. Additionally, the government has not persuaded us that the HMT is designed to simply recoup the costs of the services, e.g., port maintenance, provided by the government because the sums paid by the exporter have no reasonable relationship to the cost or the value of the services received by the exporters, and the exporters are not even the direct beneficiaries of the services. Moreover, the mere fact that Congress may have attempted to exert its power under the Commerce Clause, as opposed to the Tax Clause, as evidenced by the fact that the HMT is not designed to raise money for the general welfare, is not dispositive. *See Moon v. Freeman*, 379 F.2d 382, 390–91 (9th Cir. 1967) (stating that the "test for determining when a monetary imposition nominally imposed under the commerce power should be considered an exercise of the power to raise revenue and therefore [be] barred by the export clause" is "to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a

tax and is controlled by the taxing provisions of the Constitution."). The HMT, in fact, does not regulate or facilitate commerce and is, in effect, a tax. Therefore, as to exporters at least, the HMT is not an appropriate use of Congress' power to facilitate and regulate commerce.

New Orleans is distinguishable because there the fees were not assessed based on the value of the goods but were based on the benefit of services such as pilotage, towage and wharfage as measured by the size or weight of a vessel and paid by those benefiting from the service. 874 F.2d at 1020 (fees based on the number of days in port, the length of the vessel, and whether the ships load or unload cargo). Thus, the fees were based on the services received during port use. *Clyde Mallory Lines v. Alabama,* 296 U.S. 261 (1935), also relied on by the government, is similarly distinguishable. There, the State Docks Commission, a state agency, imposed a fee on all vessels of a certain size that entered the port and vessel operators alleged that the fee violated the constitutional provision prohibiting imposition of duties of tonnage by states. *Id.* at 262–63. The fee was designed to reimburse the agency for the costs of policing the harbor. *Id.* at 264. There, however, the parties agreed that the fee was reasonable. *Id.* at 263. Here, the parties have not reached any such agreement, and, as we conclude above, the fee is not reasonable. Moreover, there the vessel operators—the direct beneficiaries of the agency's policing actions—paid the fee. *Id.* Furthermore, all such operators received the benefits for which they paid. *Id.* at 266 ("It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it."). Finally, the statute at question in that case also had a regulatory effect "plainly devised to insure the safety of vessels and to facilitate their use of the harbor." *Id.* at 264. Here, there is no such effect. The HMT does not ensure vessel safety, but was designed to cover the costs of dredging the harbors. *See* S. Rep. No. 99–126 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647.

Finally, certain of the amici, given leave to file briefs here, argue that, because the HMT is unconstitutional and therefore void *ab initio,* all monies collected since the implementation of the HMT should be refunded. As US Shoe does not seek such recovery, there is no need for us to reach this issue. Similarly, we do not reach the issue of whether the HMT violates the Port Preference Clause because it is not necessary to our disposition of this appeal.

CONCLUSION

We conclude that the trial court properly exercised jurisdiction pursuant to 28 U.S.C. § 1581(i). Because Customs merely receives the funds from the exporters and transfers the funds to the Trust Fund without exercising any discretion, performing any analysis, calculating any amounts or issuing any decision or order, there was no Customs' "decision" for US Shoe to protest, and jurisdiction therefore could not be proper under 28 U.S.C. § 1581(a). Moreover, because the HMT is a tax,

as opposed to a user fee, directly imposed on goods in export transit, we conclude that the HMT statute, as applied to exports, violates the Export Clause and is therefore invalid to the extent it applies to exports. Therefore, the trial court properly (1) granted summary judgment that the HMT statute was unconstitutional, (2) enjoined the government from collecting further HMT on exports, and (3) ordered it to refund the HMT amounts paid by US Shoe for the period assessed in the complaint. Accordingly, the judgment of the Court of International Trade is

AFFIRMED.

MAYER, *Circuit Judge,* dissenting.

Because in my view the Harbor Maintenance Tax (HMT) is a user fee, it does not violate the Export Clause of the Constitution.

Statutes are presumed constitutional. *Fairbank v. United States,* 181 U.S. 283, 285 (1901). We must "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988). Indeed, courts must strive to avoid constitutional questions. *See NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500–01 (1979) (courts are required to choose any reasonable construction of a statute that would eliminate the need to confront a contested constitutional issue); *Hooper v. California,* 155 U.S. 648, 657 (1895) (courts must resort to "every reasonable construction * * * in order to save a statute from unconstitutionality"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo,* 485 U.S. at 575.

In light of these mandates, the question is whether the HMT is a tax or duty within the proscription of the Export Clause or whether it is a permissible user fee. Generally, a tax is enacted to raise revenue "to go to the general support of the government," *see Head Money Cases,* 112 U.S. 580, 596 (1884), while a user fee is designed as a specific charge for the use of government facilities and services, *see Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 621 (1981). If it is the latter, we avoid the sticky question whether the assessment violates the Export Clause. So, we must construe the HMT as a user fee, if reasonable to do so, unless it is "plainly contrary to the intent of Congress." *DeBartolo,* 485 U.S. at 575.

Congress thought it was enacting a user fee. It is true that the statute calls the HMT a tax and that it resides in the Internal Revenue Code. It is equally true, however, that the HMT is levied on "port use." The label is not dispositive; we must dig deeper. *See Head Money Cases,* 112 U.S. at 595–96 ("[T]he act is not void because, within a loose and more extended

sense than was used in the Constitution, it is called a tax."); *Pace v. Burgess*, 92 U.S. 372, 375 (1875); *see also Fairbank*, 181 U.S. at 304 (courts analyze things, not names).

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *See Crandon v. United States*, 494 U.S. 152, 158 (1990). The object and policy of the HMT help to reveal its true identity. The Senate Report states: "The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels. The provision of a new, deeper channel is as much a service rendered to the shipper as pilotage, dockage, or wharfage."[1] S. Rep. No. 99–126, at 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644. The House Report similarly states that the HMT is "a *charge on use* by a commercial vessel of a harbor or channel ('port') in the United States for the loading or unloading of commercial cargo on or from the vessel." H.R. Rep. No. 99–228, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6706 (emphasis added). In fact, the legislative history refers repeatedly to the HMT as being based on use. *See, e.g., id.* at 1, *reprinted in* 1986 U.S.C.C.A.N. at 6706 ("Harbor (Port) User Charges"); H.R. Conf. Rep. No. 99–1013, at 228 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6723, 6740 ("Port Use Tax"); S. Rep. No. 99–126, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 6640 ("user taxes"); *id.* at 135, *reprinted in* 1986 U.S.C.C.A.N. at 6705 (additional views of Sen. Lautenberg) ("user fee").

Moreover, the HMT was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99–662, 100 Stat. 4082 (Act), "comprehensive" legislation that addressed myriad problems in the federal water resources development program. *See* S. Rep. No. 99–126, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6641. Historically, the Federal Government ha[d] financed the full cost of designing, constructing, rehabilitating, maintaining, and operating the * * * coastal harbors of the United States." *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6643–44. Yet, the law did not "impose Federal user fees or charges on the beneficiaries of these expenditures." H.R. Rep. No. 99–228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709. Congress found that traditional harbor maintenance policy would "not meet national needs" because it was "unlikely that the Federal Government [would] finance the construction of such port improvements." S. Rep. No.99–126, at 8, *reprinted in* 1986 U.S.C.C.A.N. at 6646. As the House Report explains: "[A]dditional Federal investment is needed for operations and maintenance of U.S. channels and harbors (ports) in order to improve and maintain such ports for waterborne commerce. Such additional investment in U.S. ports will facilitate economic development and make the Nation's water

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[1] Charges for harbor services like pilotage, wharfage, and dockage are permissible. *See generally Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935).

transportation system more efficient." H.R. Rep. No. 99–228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709.

Importantly, Congress found that these needs were "clearly *commercial.*" S. Rep. No. 99–126, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6644 (emphasis added). It decided "that a portion of Federal expenditures needed for port operations and maintenance should be borne by the *direct beneficiaries* of such expenditures," commercial users. H.R. Rep. No. 99–228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709 (emphasis added). Congress targeted commercial users to help shoulder the fiscal burden of operations and maintenance costs for harbors and inland waterways because they are the parties who enjoy their benefits. The government "has an obvious interest in making those who specifically benefit from its services pay the cost." *Massachusetts v. United States*, 435 U.S. 444, 462 (1978).

One of Congress' primary difficulties, however, was deciding how to craft a user fee to "help defray the costs of maintaining new harbors deeper than 45 feet."[2] S. Rep. No. 99–126, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6647. "In recent years, the Committee considered a variety of proposals involving harbor maintenance. These ranged from diverting a portion of customs revenues for harbor work to port-by-port maintenance fees to more studies. The debate in some cases is between high maintenance harbors and low maintenance harbors; in others it is between large ports and small ports; or between bulk cargo and containerized cargo ports." *Id.* at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6646. In fact, the Senate Subcommittee on Water Resources held twenty-six hearings over three Congresses and more than four years on the Act. *Id.* at 116, *reprinted in* 1986 U.S.C.C.A.N. at 6688. Ultimately, it opted to impose a nationally-uniform fee on the "value of the cargo passing through harbors." *Id.* at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6646; *see also id.* at 111–12, *reprinted in* 1986 U.S.C.C.A.N. at 6684. The House Report explains that "the ad valorem basis of the charges is the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99–228, at 5–6, *reprinted in* 1986 U.S.C.C.A.N. at 6710.

Critically, Congress mandated that fees collected from the HMT be used only for commercial navigation projects.[3] Monies in the Harbor Maintenance Trust Fund (HMTF) may be used only to pay (1) for the operations and maintenance costs of the United States portion of the St. Lawrence Seaway, and for the eligible operations and maintenance costs "assigned to *commercial* navigation of all harbors and inland harbors within the United States," 33 U.S.C. § 2238(a) (1994) (emphasis added),

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[2] Very few bays and estuaries have natural depths greater than 20 feet. S. Rep. No. 99–126, at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6645. Yet the size of vessels has so increased that harbors forty-five feet deep are now "inadequate for many fully loaded tankers." *Id.* at 8, *reprinted in* 1986 U.S.C.C.A.N. at 6645. Congress found that the constraints of these shallow harbors "add to the costs of importing crude oil and petroleum products," and that "[d]eeper draft harbors would facilitate the export of U.S. coal and, eventually, other bulk commodities, such as grain and ores." *Id.*

[3] Interest earned on monies in the Harbor Maintenance Trust Fund (HMTF) also remains in the fund.

referenced in 26 U.S.C. § 9505(c)(1) (1994); and (2) for all of the expenses of administering the HMT incurred by the Departments of Treasury and Commerce and the U.S. Army Corps of Engineers, up to $5,000,000 per fiscal year, 26 U.S.C. § 9505(c)(3).[4] So, HMT charges, collected from commercial users, may only be expended for harbor operations and maintenance costs incurred on their behalf.

The government has been true to this constraint. In its initial report to Congress on the HMTF's status, the government explained that operations and maintenance costs for commercial navigation were accounted for in the "Corps of Engineers Management Information System." *First Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1987–1992* at 2, ¶ 6 [hereinafter *First Report].* In deciding which expenditures were reimbursable, the government recognized that some projects have both a "commercial navigation" purpose and some other purpose, such as recreation, hydropower, or flood control. *Id.* at 3, ¶ 7. All operations and maintenance expenditures made for single purpose commercial navigation projects were considered subject to reimbursement from the HMTF. *Id.* In contrast, on joint purpose projects, the government allocated costs to the project's different purposes in proportion to the benefits realized for each purpose, recovering only the commercial navigation costs. *Id.; see also Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1993* at 1–2, ¶ 4 (indicating continued compliance) [hereinafter *Second Report].* This ensures that HMT funds collected from commercial users are spent for their benefit.

In sum, it surely does not violate Congress' intent to construe the HMT as a user fee. The question is whether it is reasonable to interpret it that way. In analyzing whether a particular charge constitutes a user fee, the Court has asked whether it: (1) discriminates against the constitutionally-protected interest; (2) is based on some fair approximation of the use of some system; and (3) is structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. *Massachusetts,* 435 U.S. at 464; *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.,* 405 U.S. 707, 716–17 (1972).

First, the HMT does not discriminate against exporters. Indeed, the trial court did not hold to the contrary; it simply bypassed the issue and ruled the HMT a tax based on the second and third prongs of the *Massachusetts* test. The HMT is levied against commercial users of United States ports and harbors, including exporters, importers, domestic shippers, and passenger carriers (except ferries, as defined). Congress found these groups to be the principal beneficiaries of harbor operations and maintenance projects. It also required that HMT monies be expended only for their benefit. That the statute exempts some harbor users from payment does not render the HMT discriminatory against exporters.

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[4] 26 U.S.C. § 9505(c)(2) permits monies in the fund to be used to pay rebates of tolls or charges levied for use of the St. Lawrence Seaway, as required by 33 U.S.C. § 988a. Section 988a was amended in 1994, however, to waive the collection of tolls or charges on commercial vessels, instead of requiring commercial users to pay the toll or charge and then obtain a rebate. Pub. L. No. 103–331, § 339(a), 108 Stat. 2496.

Some exempted users, like recreational users, do not and would not benefit from operations and maintenance projects funded by the HMT because those projects are commercial in nature. Requiring such users to pay the fee would be unfair. Congress made reasonable policy decisions to exempt other users, such as nonprofit organizations transporting humanitarian and development assistance cargo. 26 U.S.C. § 4462(h); *see also id.* § 4462(b) (exempting cargo transported within Alaska, Hawaii, or any United States possession, or between those locales and the United States mainland "because of the high dependence of these islands' economies on waterborne commerce." H.R. Rep. No. 99–228, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6710). These exemptions do not compromise the HMT's non-discriminatory status.

Second, the HMT is based on a fair, if imperfect, approximation of exporters' use of, or privilege to use, United States harbors and ports. When the government "applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system." *United States v. Sperry Corp.*, 493 U.S. 52, 61 (1989). "Perfect uniformity and perfect equality of taxation, in all the respects in which the human mind can view it, is a baseless dream." *Head Money Cases*, 112 U.S. at 595. Consequently, the amount of a user fee need not be "precisely calibrated to the use that a party makes of Government services." *Sperry*, 493 U.S. at 60.

The government concedes that the HMT, like most user fees, is imperfect, but contends that it is a fair approximation of use. U.S. Shoe argues, and the court held, that this is wrong for four primary reasons: (1) all harbor users do not pay the fee, (2) there is no correlation between the charges collected at a particular port and expenditures for that port's maintenance and operations, (3) low-value, bulk cargo importers and exporters use the port facilities to a greater extent than high-value, non-bulk cargo importers and exporters yet pay lower fees, and (4) the ad valorem nature of the fee does not accurately measure use. The first three, of course, are the precise concerns with which the legislature wrestled over three Congresses and more than four years. The fourth challenge is to what Congress found to be "the only acceptable basis on which to impose such charges" because it was "uniform" and "minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99–228, at 5–6, *reprinted in* 1986 U.S.C.C.A.N. at 6710. "This was obviously the judgment of Congress and we [should] abide by it." *Sperry*, 493 U.S. at 62. Notwithstanding, I address each issue in turn.

For the same reasons that the HMT is not discriminatory, the fact that all users of our harbors and ports do not pay the fee does not mean it is an unfair approximation of use by those against whom the assessment is levied. *See Evansville*, 405 U.S. at 717–18 (upholding a user fee as a fair approximation of the use of the facilities for whose benefit they are imposed even though "a majority of the actual number of persons who use facilities of the airports involved" were exempt, because the exemptions

were not "wholly unreasonable"). Nor is there merit to U.S. Shoe's second argument that because fees collected at a particular port are not necessarily expended for operations and maintenance at that port, the fee is not a fair measure of use. This is an overly narrow view. Users do not benefit only from access to the particular ports they use. Every exporter has all ports and harbors available to it. Those that never use certain ports benefit from them "in the sense that [they] are available for their use if needed and in that" the provision of better harbor maintenance services "makes the [ports] safer for all users." *Massachusetts*, 435 U.S. at 468; *see also Sperry*, 493 U.S. at 63.

Finally, U.S. Shoe's related third and fourth arguments do not establish that the HMT is not a fair approximation of use. Initially, there is great irony in the argument that the charge is unfair because high-value, non-bulk cargo carriers are assessed higher fees than low-value, bulk cargo shippers, yet allegedly "use" harbors to a lesser extent. Exporters generally ship low-value cargo, such as grain and coal, which is transported in bulk. *See First Report* at 3, ¶ 9. Importers, on the other hand, tend to ship high-value cargo, like electronics and automoblies, which is not shipped in bulk. *Id.* Consequently, exporters are generally assessed lower fees than importers, yet they purportedly "use" the harbors to a greater extent because of the bulk nature of their shipments. Thus, it is the exporters themselves who allegedly are not bearing their fair share.

In addition to the irony, U.S. Shoe's argument is unpersuasive. First, not all bulk cargo is of low value, nor, undoubtedly, is all non-bulk cargo of high value. For example, some "high value" commodities, such as "petroleum," are transported in bulk. *Id.* Thus, to say that the HMT is unfair because low-value cargo carriers use ports to a greater extent than high-value cargo carriers is not wholly accurate. Second, even if a high-value cargo shipper never requires the use of harbors deeper than forty-five feet, there is nothing in the record to support the notion that the only operations and maintenance projects undertaken with HMTF monies are deep-harbor dredging. Indeed, U.S. Shoe does not argue that projects financed with HMTF monies are so limited. While projects are limited to those that inure to the benefit of commercial users, the government has discretion to decide which projects those are. That some users, like exporters, transport some bulk products of lower value than some non-bulk products transported by other users, does not make the HMT a tax. Nor does its ad valorem structure.

It is beyond dispute that an ad valorem charge can be a user fee. *See Sperry*, 493 U.S. at 59–64; *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cr. 1990); *see also Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992). Notwithstanding, U.S. Shoe attempts to distinguish *Sperry* and *Alamo* on the ground that the parties assessed the user fees in those cases were direct beneficiaries of the provided services. Here, it argues, the direct beneficiaries are the vessel owners, not the importers and exporters who pay the fee.

There are two problems with this argument. First, it flies in the face of Congress' finding that exporters are the direct beneficiaries. Congress decided that a portion of federal expenditures needed for port operations and maintenance should be borne by the *direct beneficiaries* of such expenditures, among whom it obviously included exporters and importers. Second, the Court rejected a similar argument in *Evansville.* There, it held that it is not "particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses." 405 U.S. at 714. Similarly, here it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses.

Finally, the HMT is structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. The relevant inquiry is whether Congress *structured* the HMT so that the monies collected under it are "fairly apportioned" to the government's cost of providing commercial harbor maintenance services. U.S. Shoe argues, and the trial court held, that the HMT fails this prong for two primary reasons: (1) it funds projects yet to be commenced rather than reimbursing the government for completed projects, and (2) the HMTF has accumulated a large surplus. The first objection is misplaced; the second, while troubling, is unavailing.

Regardless of the factual accuracy of U.S. Shoe's first concern,[5] when viewed in light of the purposes for which the HMT was enacted, it is of little relevance that HMT monies might fund port operations and maintenance projects not completed, or even initiated, at the time of collection. The HMT is not a short-term fix to the myriad problems that plague our nation's waterborne commerce. It is a long-term vehicle to improve and to maintain the harbors for the continuing benefit of United States commerce. Indeed, Congress expressly found that the fee will facilitate economic development. "[A] surplus of revenue over outlays in any one year can be offset against actual deficits of past years and *perhaps against projected deficits of future years.*" *Massachusetts,* 435 U.S. at 470 n.25 (emphasis added). The Eleventh Circuit has also recognized that user fees may be expended on future projects. In *Alamo,* it held that "given the long term nature of maintaining and developing an airport, it was appropriate * * * to factor in future development plans when setting user fees." 906 F.2d at 522. Thus, it is of little moment that HMT monies are purportedly expended to fund projects not yet started rather than to repay the government for services that have already been rendered.

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[5] The *First Report* states that "the actual transfer of funds from the [HMTF] is for expenditures made in the previous fiscal year. In other words, FY 1990 expenditures are shown as transfers from the [HMTF] in FY 1991, and so forth. Corps expenditures are never made directly from the [HMTF], nor are transfers made on the basis of estimates or projections." *First Report* at 3, ¶7. This indicates that FY 19xx projects are reimbursed from the HMTF with FY 19xx, or perhaps surplus, funds in FY 19xx+1.

Similarly, the fact that the HMTF enjoys, or perhaps suffers, a large surplus does not resolve whether Congress structured the HMT as a tax or a user fee. To be sure, the substantial surplus weighs against finding the HMT a user fee. But this does not, of itself, render it a tax. A closer look reveals that the HMT's structure was not ill-conceived. From 1987 through 1990, during which the HMT was only 0.04% ad valorem and paid just 40% of eligible Corps costs, revenues and expenditures were closely aligned. *See First Report* at 6, ¶ 13. For example, in FY 1988, HMTF expenditures actually *exceeded* revenues by approximately $6 million, and the ending balance was just $9 million. *Id.*

Trouble began in 1991, when Congress increased the ad valorem rate to 0.125% in order to fund 100% of eligible Corps expenses and to reimburse the National Oceanic and Atmospheric Administration (NOAA) $45.5 million for its annual commercial navigation costs. While the revenue generated under the higher rate was only slightly less than projected, expenditures were considerably less, resulting in a growing HMTF surplus. Withdrawals from the HMTF were less than anticipated due primarily to (1) the absence of legislation authorizing NOAA to receive its commercial navigation costs, (2) the fact that the Corps' operations and maintenance budget was lower than had been projected in 1990 when the new ad valorem rate was established, and (3) withdrawals from the HMTF for improved administration and enforcement, while authorized, remained unappropriated. *See, e.g., Second Report* at 5, ¶10.

The surplus has certainly burgeoned in recent years as a result of these unforeseen decreases in projected expenditures, but that does not mean that the HMT's structure shows it to be a tax. Congress is not prescient. In fact, the government recognizes that this is a problem about which something must be done. *See Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 7, ¶16 ("The growing surplus in the HMTF remains. This can only be corrected by widening the authorized uses for HMTF monies, or by reducing the HMF [sic] to a level consistent with its annual expenditures."). Congress has already amended the HMT statute once. There is no reason to believe that it will not correct the growing surplus. Until then, commercial users know that all HMT monies plus interest may only be expended for harbor operations and maintenance projects with commercial purposes. They may not be used for the general support of the government. *See Northwest Airlines, Inc. v. County of Kent,* 510 U.S. 355, 371–72 (1994) (declining to decide whether an airport user fee, which had accumulated "huge surpluses," was excessive under *Evansville,* in part because all fees collected had to be expended for the airport's capital or operating costs, and the airlines challenging the fee had not suggested that the surplus was being used for any purpose other than airport related expenses); *Head Money Cases,* 112 U.S. at 596 (charges imposed on shipowners for each immigrant they brought into the United States, which were deposited into an "immigrant fund" ap-

propriated in advance for the temporary care of passengers whom shipowners transported, was not a tax).

I would reverse the judgment of the Court of International Trade.

PAC FUNG FEATHER CO., LTD. AND NATURAL FEATHER & TEXTILES, PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 96–1211

(Decided April 8, 1997)

John M. Peterson, Neville, Peterson & Williams, of New York, New York, argued for plaintiffs-appellants. With him on the brief were *George W. Thompson* and *Arthur K. Purcell*.

Rhonda K. Schnare, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director.

Appealed from: United States Court of International Trade.
Judge RESTANI.

Before NEWMAN, MAYER, and BRYSON, *Circuit Judges*.

MAYER, *Circuit Judge*.

Pac Fung Feather Company, Ltd. and its United States selling agent, Natural Feather & Textiles, Inc., appeal the United States Court of International Trade's summary judgment, *Pac Fung Feather Co., Ltd. v. United States*, 911 F. Supp. 529 (1995), upholding the United States Customs Service's rules of origin for textile and apparel products. We affirm.

BACKGROUND

Section 334(b) of the Uruguay Round Agreements Act sets out principles for determining the country of origin of textiles and apparel products imported into the United States. *See* Pub. L. No. 103–465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. § 3592(b)). Section 334(a) of the Act directs the Secretary of the Treasury to promulgate rules to implement section 334(b)'s principles. § 334(a), 108 Stat. at 4949. Accordingly, the Customs Service promulgated Rules of Origin for Textile and Apparel Products (Rules), 60 Fed. Reg. 46,188 (1995) (codified at 19 C.F.R. § 102.21 (1996)), on September 5, 1995. In relevant part, the Rules deem any textile or apparel article comprised of materials from a single country and classified under headings 5609, 5807, 5811, 6213, 6214, 6301–6306, or 6308 or subheadings 6209.20.50.40, 6307.10, 6307.90, or 9404.90 of the Harmonized Tariff Schedule of the United States (together, the enumerated headings and subheadings) to originate in the "country, territory, or insular possession" where the article's component

fabric, staple fibers, or continuous filaments were made. *See* 19 C.F.R. § 102.21(e).*

Pac Fung manufactures home textile and bedding goods in Hong Kong, Macau, and the People's Republic of China. During 1994 and 1995, Pac Fung exported to the United States more than $50 million worth of merchandise (1) manufactured in Hong Kong or Macau, (2) comprised entirely of Chinese-woven fabric, (3) categorized under the enumerated headings and subheadings, and (4) identical to articles classified under category 362, the United States' import quota category for various cotton bedding articles deemed to originate in China. Before the Rules became effective on July 1, 1996, Customs considered these products to have originated where Pac Fung assembled them—in Hong Kong or Macau. The Rules now deem the merchandise to come from China, *see* 19 C.F.R. § 102.21, thereby subjecting it to an absolute quota limit for category 362 articles, *see* Agreement Concerning Trade in Textile and Apparel Products, March 29–June 8, 1995, U.S.-P.R.C., Hem's No. KAV 4284, Temp. State Dep't No. 95–148 (setting import quotas); Establishment of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products and Silk Apparel Produced or Manufactured in the People's Republic of China, 62 Fed. Reg. 6950 (1997) (same).

Alleging that the Rules are arbitrary, capricious, an abuse of discretion, and not in accordance with the law," the importers sued in the Court of International Trade to enjoin the government from implementing and enforcing them. Holding that the Rules comply with section 334(b), the court entered judgment for the United States. The importers appeal.

DISCUSSION

As a threshold matter, the government argues that the Court of International Trade lacked jurisdiction under 28 U.S.C. § 1581(i) because the importers failed to establish the manifest inadequacy of 28 U.S.C. § 1581(h), here a prerequisite for section 1581(i)'s entirely residual jurisdiction, *see Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) ("Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.").** We disagree. Section 1581(h) gives the Court of International Trade "exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling

* Specifically, under 19 C.F.R. § 102.21(e), (1) "[i]f of continuous filaments, including strips, the country of origin of a good classifiable under heading 5609 is the country, territory, or insular possession in which those filaments, including strips, were extruded," and (2) "[i]f of staple fibers, the country of origin of a good classifiable under heading 5609 is the country, territory, or insular possession in which those fibers were spun into yarns." Furthermore, (3) "[t]he country of origin of a good classifiable under heading 6308 is the country, territory, or insular possession in which the woven fabric component of the good was formed by a fabric-making process," and (4) "[t]he country of origin of a good classifiable under" any one of the remaining enumerated headings and subheadings "is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process."

** The government also contends that the importers lack standing. We agree with the trial court's view that the importers allege sufficient injury to confer standing. *See American Ass'n of Exporters and Importers-Textile and Apparel Group v. United States*, 751 F.2d 1239, 1246 (Fed. Cir. 1985).

issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification * * * or similar matters." As the trial court correctly held, the preordained ruling available to the importers under section 1581(h) would be manifestly inadequate. When promulgating the rules, Customs unmistakably indicated how it would determine the origin if, for example, "a fabric is woven in one country and wholly assembled in a second country"; thus, obtaining a ruling would be a mere formality. *See* Rules of Origin for Textile and Apparel Products (Rules), 60 Fed. Reg. at 46,192 (explaining that Customs modified the rules to preclude assembly from conferring origin).

Section 1581(i) was the importers' only available and potentially adequate option. That section confers upon the Court of International Trade "exclusive jurisdiction of any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * (3) embargoes or other quantitative restrictions on the importation of merchandise * * * ; or (4) administration and enforcement with respect to the matters referred to in [paragraph 3]." This case arises out of the Uruguay Round Agreements Act. Section 333 of the Act, which amended the Tariff Act of 1930, 46 Stat. 590 (1930), authorizes the President "to publish a list of countries in which illegal activities have occurred involving * * * activities designed to evade quotas * * * on textile or apparel products, if those countries fail to demonstrate a good faith effort to cooperate * * * in ceasing such activities." *See* § 333, 108 Stat. at 4949. By authorizing such a penalty, the Uruguay Round Agreements Act, on its face, provides for the administration or enforcement of quantitative restrictions and satisfies the requirements of 28 U.S.C. § 1581(i)(4).

Having established jurisdiction, the importers allege that the Rules do not comply with section 334(b). Section 334(b) consists of a "general rule," a "special rule," and a "multicountry rule." Paragraph (b)(1), the general rule, provides,

> Except as otherwise provided for by statute, a textile or apparel product * * * originates in a country, territory, or insular possession * * * if—(A) the product is wholly obtained or produced [there]; (B) the product is a yarn, thread, twine, cordage, rope, cable, or braiding [made there]; (C) the product is a fabric [made there] by any * * * fabric-making process * * *; or (D) the product is any other textile or apparel product that is wholly assembled [there] from its component pieces.

19 U.S.C. § 3592(b)(1). Subparagraph (b)(2)(A), the relevant portion of the special rule, qualifies paragraph (b)(1). Specifically addressing goods classified under the enumerated headings and subheadings, it adds that "[n]otwithstanding paragraph (1)(D)— * * * the origin of a good that is classified under one of the [enumerated headings and subheadings] * * * shall be determined under subparagraph (A), (B), or (C) of paragraph (1), as *appropriate." Id.* § 3592(b)(2)(A) (emphasis added).

This case turns on the meaning of "as appropriate" in section 334(b)(2)(A). The government contends that "as appropriate" means

"most suitable." In contrast, the importers argue that "[t]o the extent that the Special Rule 'borrows' certain parts of the General Rule 'as appropriate', it reflects a Congressional understanding that some of the goods classified under the Special Rule headings *can* be 'wholly obtained or produced in a single country', or *can* be 'yarns, threads, etc. or fabrics'." In other words, the importers define "as appropriate" to preclude determining the origin of a good falling under the enumerated headings and subheadings if the product does not fall literally under (A), (B), or (C) of section 334(b)(1): "as appropriate" means "only if appropriate."

However, the importers' definition unravels its statutory meaning. Neither party disputes that (A), (B), and (C) of section 334(b)(1) each determines origin according to its respective, literal terms. In fact, were section 334(b)(2)(A) to incorporate (A), (B), and (C), without adding "as appropriate," the section concomitantly would include each subparagraph's literal limits. The words "as appropriate," as defined by the importers, therefore cannot restrict the classification to the literal terms of (A), (B), and (C). The remainder of section 334(b)(2)(A) already does. To add language meaning "only if appropriate" would be redundant.

"The cardinal principle of statutory construction is to save and not to destroy." *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). We must "give effect, if possible, to every word and clause of a statute." *Inhabitants of Montclair v. Ramsdell,* 107 U.S. 147, 152 (1883). For all intents and purposes, the importers' definition of "as appropriate" nullifies the effect of section 334(b)(2)(A).

On the other hand, defining "as appropriate" as "most suitable" permissibly expands the literal terms of (A), (B), and (C). As we read the statutory scheme, the country of origin must be determined by whichever of section 334(b)(1) (A), (B), or (C) is best fitted to the product. We do not subscribe to the importers' view that because the condition of the product as imported is beyond the form of fiber or fabric, it is inappropriate to invoke subparagraphs (A), (B), or (C) at all, thereby throwing the matter under the more advantageous multicountry assembly rule of section 334(b)(3).

CONCLUSION

Accordingly, the judgment of the Court of International Trade is affirmed.

AFFIRMED

INA WALZLAGER SCHAEFFLER KG AND INA BEARING CO., INC., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE, AND TORRINGTON CO. DEFENDANT-APPELLEE

Appeal No. 96–1256 and 96–1266

(Decided February 24, 1997)

Stephen L. Gibson, Arent Fox Kintner Plotkin & Kahn, of Washington, D.C., argued for the plaintiffs-appellants. With him on the brief was *Peter L. Sultan.*

Velta A. Melnbrencis, Assistant Director, Commerical Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for the defendant-appellee, The United States. With her on the brief was *Frank W. Hunger,* Assistant Attorney General, David M. Cohen, Director. Also on the brief were *Stephen J. Powell,* Chief Counsel for Import Administration, *Berniece A. Browne,* Senior Counsel and *Thomas H. Fine,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Wesley K. Caine, Stewart & Stewart, of Washington, D.C., argued for the defendant-appellee, The Torrington Company. With him on the brief were *Terence P. Stewart* and *Lane S. Hurewitz.* Of counsel was *Geert De Prest.*

Appealed from: United States Court of International Trade.
Judge TSOUCALAS.

Before ARCHER, *Chief Judge,* LOURIE and BRYSON, *Circuit Judges.*

BRYSON, *Circuit Judge.*

INA Walzlager Schaeffler KG and INA Bearing Company, Inc. (collectively INA) appeal from a decision of the Court of International Trade upholding a Commerce Department ruling in an antidumping case. In the challenged ruling, Commerce determined that certain INA roller bearings are within the scope of an antidumping duty order concerning cylindrical roller bearings imported from Germany. We agree with the Court of International Trade that, under the deferential standard of review applicable in this setting, Commerce's scope determination must be upheld.

I

In 1988, the Torrington Company, a United States manufacturer of antifriction bearings, filed a petition with the Commerce Department requesting the imposition of antidumping duties on imports of certain antifriction bearings from Germany and eight other countries. In response to the petition, Commerce initiated an investigation. Commerce's Office of Investigations prepared a "class or kind" memorandum, which concluded that the petition actually encompassed five different kinds of bearings: (1) ball bearings; (2) spherical plain bearings; (3) spherical roller bearings; (4) cylindrical roller bearings (CRBs); and (5) needle roller bearings (NRBs). The memorandum noted that the "general physical characteristics of bearings are significantly different with regard to the shape of the rolling element contained within the bearing."

At the end of its investigation, Commerce concluded that each of the five identified classes of bearings were being sold in the United States at

less than fair value. Commerce. included under the CRB designation "all antifriction bearings which employ cylindrical rollers as the rolling element" and under the NRB designation "all antifriction bearings which employ needle rollers as the rolling element."

As required by 19 U.S.C. § 1673a(a), the International Trade Commission (ITC) conducted an investigation to determine whether the importation of the antifriction bearings was materially injuring, threatening to injure, or retarding the establishment of any U.S. industry. The ITC determined that imports of CRBs from Germany were causing injury to a U.S. industry, but that imports of NRBs from Germany were not.

Following the ITC's injury determination, Commerce issued an antidumping duty order that covered CRBs, but not NRBs, from Germany. Shortly thereafter, a German bearing manufacturer, FAG Kugelfischer Georg Schaefer KGaA (FAG), requested that Commerce interpret the scope of the order to exclude certain engine bearings on the ground that the bearings were needle roller bearings and therefore were not within the scope of the order.

In conducting the FAG scope determination, Commerce concluded that "the petition and the underlying investigations demonstrate that the length-to-diameter ratio of a bearing is the key factor to distinguish a needle roller bearing from a cylindrical roller bearing." Commerce added, however, that "neither the petition nor the underlying investigations conclusively establish a specific minimum ratio" for distinguishing between CRBs and NRBs. Commerce noted, for example, that the petition stated that a roller element length-to-diameter ratio of 2.5–to–1 generally distinguishes CRBs from NRBs, while the staff report underlying the ITC's final determination referred to a ratio of 4–to–1 as "the appropriate cut-off." Because of the absence of a clear line of demarcation in the administrative record, Commerce consulted the *Mechanical Engineers' Handbook* (Theodore Baumeister ed., 1958) *(Marks' Handbook),* a standard reference in the field, which characterized CRBs as having "[r]oller bearings with short straight rollers" and NRBs as having "rollers whose length is at least four times the diameter." Commerce then ruled that CRBs were to be distinguished from NRBs based on the dimensions of their roller elements, and that bearings with roller elements having a length-to-diameter ratio of less than 4–to–1 would be considered CRBs under the antidumping duty order.

Commerce applied the 4–to–1 length-to-diameter test in subsequent decisions arising from the German antidumping duty order and a similar order applicable to antifriction bearings from Japan. *See NTN Bearings Corp. of Am. v. United States,* 905 F. Supp. 1083 (Ct. Int'l Trade 1995); *Koyo Seiko Co. v. United States,* 834 F. Supp. 1401 (Ct. Int'l Trade 1993), *aff'd* 31 F.3d 1177 (Fed. Cir. 1994) (unpublished table decision); *Nippon Thompson Co. and IKO Int'l,* 58 Fed. Reg. 11209 (Dep't Commerce 1992). In two of those cases *(Koyo Seiko* and *NTN Bearings),* the importers sought judicial review, and the 4–to–1 test was upheld in both cases.

In late 1992 INA submitted a request for a scope ruling, in which it asked Commerce to rule that all of the articles in certain INA bearing series were outside the scope of the antidumping duty order. In its request, INA urged Commerce to define NRBs according to "common industry standards" and argued that "[t]he evolution of the scope test has now resulted in a definition (the '4 to 1 test') that bears no relationship whatsoever to clearly established industry standards and practices." INA argued that in the FAG scope determination Commerce should not have relied upon *Marks' Handbook*, but "should have referenced the sales catalogs of the bearing manufacturers and the standards documented by ISO [International Organization for Standardization] and DIN [Deutsches Institut für Normen eV]." To show that the bearings covered by its scope request were recognized in the industry as needle roller bearings, INA included pages from its catalog identifying INA bearings according to series designations, the ISO and DIN classifications of bearings, and pages from the Torrington Company catalog listing equivalent bearings as needle roller bearings. INA also asserted that, should Commerce continue to rely on a length-to-diameter ratio for distinguishing between CRBs and NRBs, it should adopt the 2.5–to–1 ratio set forth in Torrington's petition.

Commerce rejected INA's request and adhered to the 4–to–1 length-to-diameter test established in the FAG scope determination. INA then sought review of Commerce's ruling in the Court of International Trade, asserting that the 4–to–1 test would improperly expand the scope of the antidumping duty order and that Commerce had improperly disregarded industry standards in adopting the 4–to–1 test. Relying on its prior rulings in the *Koyo Seiko* and *NTN Bearing* cases, the Court of International Trade held that Commerce's 4–to–1 ratio test was a permissible standard for determining the scope of the antidumping duty order. Because the roller elements of INA's bearings were not thin enough to qualify the bearings as NRBs under the 4–to–1 ratio test, the court sustained Commerce's determination that INA's bearings were CRBs and therefore fell within the scope of the antidumping duty order. The Court of International Trade subsequently reached the same conclusion in reviewing the final results of Commerce's third annual administrative review of the antidumping duty order. INA then took this appeal from both rulings of the Court of International Trade, challenging Commerce's use of the 4–to–1 test for distinguishing CRBs from NRBs.

II

Antidumping duties are assessed when Commerce determines that a class or kind of merchandise is being, or is likely to be, sold in the United States at less than its fair value and the ITC determines that the importation of such merchandise is causing or threatening to cause material injury to a United States industry, or is materially retarding the establishment of an industry in the United States. *See* 19 U.S.C. § 1673. In response to an application by an interested party to determine wheth-

er a particular product is within the scope of an antidumping duty order, *see* 19 C.F.R. § 353.29(b), Commerce considers the following:

> (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary and the Commission.
> (2) When the above criteria are not dispositive, the Secretary will further consider:
>
> (i) The physical characteristics of the product;
> (ii) The expectations of the ultimate purchasers;
> (iii) The ultimate use of the product; and
> (iv) The channels of trade.

19 C.F.R. § 353.29(i).

It is undisputed that the bearings at issue in INA's scope request have a length-to-diameter ratio of less than 4–to–1 and thus constitute CRBs under Commerce's test. The only issue before us is whether the line Commerce has drawn to distinguish CRBs from NRBs is unsupported by substantial evidence or is contrary to law. *See* 19 U.S.C. § 1516a(b)(1).

Commerce's definition of CRBs for purposes of the antidumping duty order has two components. First, Commerce has determined that the distinction between CRBs and NRBs turns on the length-to-diameter ratio of their roller elements. Second, Commerce has selected a length-to-diameter ratio of 4–to–1 as the line at which the distinction is to be drawn. There is clearly substantial evidence in the administrative record to support Commerce's conclusion as to the first component—that the distinction between CRBs and NRBs in the antidumping duty order is based on the ratio of the length of the roller element to its diameter. It is a closer question whether there is substantial evidence to support Commerce's conclusion as to the second component—that 4–to–1 is the proper length-to-diameter ratio to distinguish between CRBs and NRBs. Nonetheless, in light of Commerce's broad authority to interpret the scope of its anitdumping duty orders, we sustain its selection of the 4–to–1 ratio.

A

INA contends that in interpreting the antidumping duty order, Commerce erred by looking beyond the definitions of CRBs and NRBs contained in the petition, the original investigation notices, the Commerce and ITC determinations, and the order itself. Those definitions, according to INA, were meant to reflect the ordinary meaning of the terms in the industry and do not support Commerce's selection of the 4–to–1 length-to-diameter ratio as the dividing line between CRBs and NRBs.

Contrary to INA's contention, the administrative record leading to the issuance of the antidumping duty order does not provide much guidance as to the distinction between CRBs and NRBs. The petition characterizes NRBs as "a type of cylindrical bearing distinguished by a comparatively small diameter and a high ratio of length to diameter." The notices and the order are likewise imprecise in that respect. Both

characterize "needle bearings" as bearings having "needle rollers," and "cylindrical bearings" as bearings having "cylindrical rollers," without further defining the terms "needle rollers" and "cylindrical rollers."

While the petition, the notices, and the antidumping duty order do not draw a clear line of distinction between the two types of bearings at issue in this case, they do have this important feature in common: they teach that the classification of a bearing as a CRB or an NRB is determined by the physical characteristics of its rolling element. The materials that Commerce and the ITC consulted in the course of their investigations likewise focused on the physical characteristics of the roller elements in distinguishing between CRBs and NRBs. Commerce's "class or kind" memorandum drew distinctions among the various types of roller bearings "based on the type of rolling element contained in each type of bearing." The staff report that accompanied the ITC's "material injury" determination similarly focused on the length-to-diameter ratio of the roller elements as the critical feature distinguishing CRBs from NRBs. And the reports that preceded the ITC's "material injury" determination also identified the shape of the roller element as the distinguishing feature of the two types of bearings. *See* International Trade Comm'n, USITC Pub. No. 1797, *Competitive Assessment of the U.S. Ball and Roller Bearing Industry* 11 (Jan. 1986) ("Needle roller bearings are a special type of cylindrical bearing, distinguished by a comparatively small diameter and high ratio of length to diameter."); International Trade Comm'n, USITC Pub. No. 2083, *Antifriction Bearings (Other Than Tapered Roller Bearings) And Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom* A–4 (May 1988) (preliminary determination) ("Roller bearings are classified according to the shape of the roller used.").

Because the materials in the administrative record repeatedly focused on the physical properties of the roller element as the basis for distinguishing CRBs from NRBs, we conclude that Commerce's decision to distinguish between NRBs and CRBs on the basis of the length-to-diameter ratio of the roller element is supported by substantial evidence. We therefore reject INA's argument that Commerce should not have based its scope determination on the physical properties of the roller elements, but should have looked to the ISO and DIN classifications or the designations used by INA and Torrington in their catalogs.

B

While the materials in the administrative record amply support the use of the length-to-diameter ratio to categorize cylindrical bearings, those materials are not nearly as helpful in identifying the particular ratio that should be used to draw the line between cylindrical and needle bearings. The original Torrington petition characterized NRBs as having "[g]enerally a ratio of length to diameter of 2.5 to one." The staff report that was prepared during the course of the ITC investigation pointed to a different ratio, stating that needle bearings "often" have a

roller element with a length "at least four times greater than its diameter." The synopsis of a report prepared by Commerce's Office of Industrial Resources Administration (OIRA), which Commerce consulted in the course of its investigation, adopted that same ratio, although more definitively: it stated that "[n]eedle roller bearings have rolling elements with lengths at least four times greater than diameter."

In its final determination, the ITC cited the Harmonized Tariff Schedule of the United States (HTSUS), which distinguishes between needle roller bearings and other cylindrical roller bearings by reference to the structure of their roller elements. Under the HTSUS, roller bearings with cylindrical rollers not exceeding five millimeters and "having a length which is at least three times the diameter" are classified as needle roller bearings, and all other bearings with cylindrical rollers are classified as cylindrical roller bearings. The ITC's reference to the tariff schedule would seem to provide support for adoption of a 3–to–1 length-to-diameter test for distinguishing between CRBs and NRBs, but INA does not contend that the HTSUS classification resolves the definitional issue. In fact, INA argues that "tariff classifications are not dispositive of scope issues," and that the ITC's reference to the tariff schedules does no more than indicate that the ITC did not mean to adopt a 4–to–1 length-to-diameter ratio as the test for distinguishing CRBs from NRBs.

In the scope ruling under review here, Commerce followed its prior, more detailed scope ruling in the FAG case, in which Commerce first settled on the 4–to–1 length-to-diameter ratio as the proper test for distinguishing between CRBs and NRBs. In the FAG scope ruling, Commerce explained that in choosing among competing length-to-diameter ratios it had consulted *Marks' Handbook*, which characterizes NRBs as having a length "at least four times the diameter." INA asserts that *Marks' Handbook* does not reflect industry standards for distinguishing between CRBs and NRBs, and that it was therefore error for Commerce to rely on that publication. INA's argument, however, ignores the first step in Commerce's analysis. Once Commerce decided that the antidumping duty order distinguishes NRBs from CRBs on the basis of the length-to-diameter ratio of their roller elements, it was no longer relevant that the manufacturers' catalogs and the ISO and DIN standards classified NRBs in a different manner. Commerce's task at that point was simply to select the most suitable ratio of length to diameter. With respect to that issue, the 4–to–1 ratio set forth in *Marks' Handbook* supported the definition suggested by the ITC staff report and adopted in the OIRA synopsis. In light of the conflict among the sources to which Commerce had reference and the absence of any dispositive ratio that Commerce was legally compelled to adopt, we conclude that it was permissible for Commerce to select the 4–to–1 length-to-diameter ratio as the dividing line between CRBs and NRBs.

C

In addition to challenging Commerce's scope ruling on substantial evidence grounds, INA points to several specific flaws in the ruling and

contends that those flaws undermine the validity of Commerce's decision. While INA's criticisms of the ruling are well founded in several respects, the flaws in the decision are not fatal.

One of INA's arguments is that Commerce's reliance on a long-outdated edition of *Marks' Handbook,* rather than the more current edition, undermines the validity of Commerce's selection of the 4–to–1 test. The current edition of *Marks' Handbook,* like the edition on which Commerce relied, defines NRBs by reference to the 4–to–1 ratio, but the current edition also refers to CRBs as having rolling elements "with approximate length-diameter ratio ranging from 1:1 to 1:3," a definitional provision not found in the earlier edition. The new material, INA argues, points away from the 4–to–1 ratio test that Commerce adopted.

Commerce's use of an outdated edition of a reference work on which it placed significant reliance certainly seems to reflect careless staff work. It does not, however, require reversal, because the error was not prejudicial in the circumstances of this case. INA acknowledges that, for purppoes of the antidumping duty order, any cylindrical roller bearing that is not an NRB is necessarily a CRB. Because NRBs were specifically excluded from the coverage of the antidumping duty order, it was proper for Commerce to focus on the definition of NRBs in determining the scope of the order. While the definition of CRBs changed between the sixth and ninth editions of *Marks' Handbook,* the definition of NRBs remained constant. It was therefore permissible for Commerce to rely on the *Marks' Handbook* definition of NRBs to distinguish between the two classes of bearings, even though the edition of *Marks' Handbook* that Commerce consulted was long out-of-date.

On the same theme, INA notes that the ITC staff report, which used the 4–to–1 test in referring to NRBs, also stated that CRBs have rollers that are "approximately equal in length and diameter." That reference, INA argues, undermines whatever support the staff report provides for the 4–to–1 ratio as the dividing line between CRBs and NRBs. The staff report's reference to CRBs, however, was sufficiently general that it was not necessarily inconsistent with the more specific 4–to–1 ratio that the report used in defining NRBs. Moreover, it is reasonable to conclude that it was the definition of NRBs that informed the ITC's decision that the importation of NRBs was not causing or threatening material injury to any U.S. industry. In addressing the scope of the antidumping duty order, Commerce therefore permissibly focused on the definition of NRBs that the ITC had before it when making its "material injury" determination.

Finally, pointing to Commerce's statement in the INA scope ruling that the ITC "relied upon the 4 to 1 ratio to distinguish cylindrical and needle roller bearings," INA contends that Commerce's characterization of the ITC proceeding was incorrect and that the scope ruling must be overturned for that reason. We agree with INA that Commerce's statement that the ITC "relied on" the 4–to–1 ratio in making its material injury determination and thus required Commerce to adopt that

test is at least an overstatement. Nonetheless, that mischaracterization is harmless, because Commerce based its ruling in this case primarily on the analysis it had employed in the FAG scope ruling. There, as we have noted, Commerce permissibly concluded that the definitions of CRBs and NRBs for purposes of the antidumping duty order turned on the length-to-diameter ratio of the roller elements in the bearings, and that the 4–to–1 ratio was the best line of demarcation between the two. That analysis was sufficient to reject INA's reliance on its catalog and the ISO and DIN bearing designations. Commerce's remarks about the extent to which the ITC embraced the 4–to–1 standard were therefore not critical to its decision in this case and accordingly do not require that the scope determination be overturned.

In sum, we hold that Commerce's determination in this case fell within the agency's broad authority to interpret its own antidumping duty orders. *See Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (Commerce 'enjoys substantial freedom to interpret and clarify its antidumping duty orders"). We therefore affirm the decision of the Court of International Trade upholding Commerce's determination that INA's subject bearings are within the scope of the antidumping duty order on antifriction bearings imported from Germany.

Each party shall bear its own costs for this appeal.

AFFIRMED.

MIDWEST OF CANNON FALLS, INC., PLAINTIFF/CROSS-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 96–1271 and 96–1279

(Decided August 14, 1997)

Joel K. Simon, Serko & Simon, of New York, New York, argued for plaintiff/cross-appellant. With him on the brief were *Arlen T. Epstein* and *Leibert L. Greenberg*.

Mikki Graves Walser, Attorney, Commercial Litigation Branch Civil Division, Department of Justice, International Trade Field Office, of New York, New York, argued for defendant-appellant. With her on the brief was *Joseph I. Liebman*, Attorney in Charge. Also with her on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director, Department of Justice, of Washington, DC. Of counsel on the brief was *Sheryl A. French*, International Trade Field Office, of New York, New York.

Appealed from: United States Court of International Trade.
Judge GOLDBERG.

Before RICH, NEWMAN, and CLEVENGER, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

The United States (the government) appeals from the judgment of the United States Court of International Trade holding that the Customs

Service (Customs) incorrectly classified 25 of the 29 imported items. Midwest of Cannon Falls, Inc. (Midwest) cross-appeals on the classification of two of the four items on which the trial court ruled in favor of the government. We hold in favor of Midwest, affirming the trial court's judgment with respect to the 25 items appealed by the United States and reversing with respect to the two items cross-appealed by Midwest.

I

Midwest imports the following 29 holiday-related items for resale to retailers: (1) Nutcrackers (Santa, soldier, king, presidents, athletes and professionals); (2) Wooden pull toy (ice skater); (3) Toy smoker (Santa); (4) Porcelain and fabric mâché Santa; (5) Fabric mâché Mrs. Claus; (6) Cast iron stocking hangers (Santa); (7) Cast iron stocking hangers (Santa with lamb); (8) Cast iron stocking hangers (Christmas elf); (9) Cast iron stocking hangers (stacked animal); (10) Cast iron stocking hangers (cargo car); (11) Terra cotta turkey container; (12) Earthenware rabbit with carrot; (13) Heart-shaped metal wreath; (14) Jack-o'-lantern earthenware mug; (15) Jack-o'-lantern earthenware pitcher; (16) Christmas water globe; (17) Easter water globe; (18) Santa with chimney smoker; (19) Fabric mâché Santa with bag of toys; (20) Fabric mâché Scanda Klaus; (21) Fabric mâché MacNicholas; (22) Porcelain Santa with light-up tree; (23) Resin figures (hooded Santa roly-poly); (24) Resin figures (figures decorating tree); (25) Resin figures (Santa in sleigh); (26) Resin figures (Santa with tree); (27) Resin figures (old-fashioned Santa figure); (28) Resin figures (Santa with deer); and (29) Resin figures (Santa sewing an American flag).

All of the above items are advertised and sold to consumers before the particular holiday with which they are associated, the vast majority being sold during the Christmas season. They were entered in 1990 and 1991 and liquidated in 1991. Customs classified the products variously as earthenware ornamental ceramic articles, dolls, glassware, other tableware and kitchenware articles, other ornaments of base metal, and other articles of plastics.

Midwest claims that all of the items should be classified as festive, carnival or other entertainment articles under heading 9505 of the Harmonized Tariff Schedule of the United States (HTSUS). In particular, it argues that the Christmas-related items should be classified as Christmas ornaments or as other articles for Christmas festivities under subheading 9505.10, and that the items related to Halloween, Thanksgiving, Valentine's Day, and Easter should be classified as other festive articles under subheading 9505.90.

Of the 29 items, the trial court held in favor of Midwest on all except for four items (items 11, 12, 14 and 15). The United States appeals the 25 items on which Midwest prevailed, and Midwest cross-appeals two of the four items on which the United States prevailed—items 14 (jack-o'-lantern earthenware mug) and 15 (jack-o'-lantern earthenware pitcher). Items 11 and 12 are not on appeal.

II

A classification decision, ultimately, is a question of law based on two underlying steps. *Universal Elecs. Inc. v. United States,* 112 F.3d 488, 491 (Fed. Cir. 1997). The first step is to determine the scope of the tariff classification provision. This step, being a question of law, is reviewed *de novo* by this court. *Totes, Inc. v. United States,* 69 F.3d 495, 497–98 (Fed. Cir. 1995). The second step asks whether the items at issue come within a particular tariff provision, as properly interpreted, and is a question of fact. Id. at 498. Because the government's primary argument here centers around the legal scope of the classification term "Christmas ornament," we independently review the trial court's and Customs' decisions. *See Universal Elecs.,* 112 F.3d at 493 ("On questions of law, we defer to neither Customs' nor the Court of International Trade's interpretations; we decide such questions afresh."); *Rollerblade, Inc. v. United States,* 112 F.3d 481, 484 (Fed. Cir. 1997) ("[N]o deference attaches to Customs' classification decisions * * * where there are no disputed issues of material fact.").

III

This case raises the following three principal issues: (1) whether the trial court correctly rejected the government's argument that the items at issue are categorically excluded from classification as "festive articles" under heading 9505, HTSUS; (2) whether the trial court correctly held that "Christmas ornaments" under subheading 9505.10.25 are not limited to articles that (a) hang primarily from a tree, (b) are inexpensive, and (c) are traditionally associated with Christmas; and (3) whether the trial court correctly held that festive articles with a utilitarian function are categorically excluded from classification under heading 9505. As explained in turn below, we affirm the trial court's decision as to the first two issues and reverse as to the last issue.

A

The government's lead argument is that most of the items at issue are categorically excluded from classification under heading 9505, HTSUS.[1] We begin our analysis with the language of the pertinent HTSUS provisions:

9505, HTSUS	Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof;
9505.10	Articles for Christmas festivities and parts and accessories thereof:
	Christmas ornaments:
9505.10.10	Of glass
	Other:
9505.10.15	Of wood

[1] The government argues that most of the items at issue categorically cannot be classified under heading 9505. With respect to those items, the government relies on its principal arguments and does not assert the doctrine of relative specificity. This opinion addresses the government's principal arguments only and adopts the trial court's reasoning with respect to the items for which the government raises the doctrine of relative specificity.

9505.10.25	Other
9505.10.30	Nativity scenes and figures thereof
	Other:
9505.10.40	Of plastics
9505.10.50	Other
9505.90	Other:
9505.90.20	Magic tricks and practical joke articles; parts and accessories thereof
9505.90.40	Confetti, paper spirals or streamers, party favors and noisemakers; parts and accessories thereof
9505.90.60	Other

The government argues that heading 9505, HTSUS ("Festive, carnival or other entertainment articles") is by its plain language limited to "entertainment" articles, which the government further defines as articles for "amusement or merriment." The government focuses on the phrase "or *other* entertainment articles." It argues that the term "other entertainment" operates to modify the preceding words, "festive and carnival." The government then concludes that all of the articles under heading 9505, including festive and carnival articles, must be limited to "entertainment articles." The government contends that none of the imported items are entertainment items *(i.e.,* used for amusement or merriment), and consequently, none can be classified under heading 9505.

The government's argument fails for two reasons. First, it is somewhat unclear what the government means by articles for "entertainment, amusement or merriment" because the imported items *(e.g.,* various Santa figures) are at least as "entertaining" as Christmas *tree* ornaments that the government admits belong under heading 9505. As far as the degree of "entertainment, amusement or merriment" is concerned, we perceive no appreciable difference between the two, each of which exists in order to enhance the state of merriment at the yuletide holiday season. Thus, to the extent Christmas tree ornaments are "entertainment" articles within the meaning of heading 9505 as advocated by the government, so are the imported items at issue. Second, we note that heading 9505 includes nativity scenes and figures thereof. *See* heading 9505.10.30, HTSUS. Thus, even under the government's own argument, heading 9505 covers a range of products spanning Christmas tree ornaments to nativity scenes. The imported Christmas ornaments here are at least as "entertaining" as the nativity scenes. In sum, all of the items at issue are used in celebration of and for entertainment on a joyous holiday, and they are all *prima facie* classifiable as "festive articles" under heading 9505.

B

The government next seeks to impose three requirements to the term, "Christmas ornaments," namely that such articles must: (a) hang primarily from a tree; (b) be inexpensive; and (c) be traditionally associated

with Christmas. We agree with the trial court that the requirements advocated by the government find no basis either in the plain language of the HTSUS or in any other controlling authority.

1

First, the government argues that the term "Christmas ornament" is often understood by consumers and industry participants to refer to "Christmas tree ornament" and that the classification term should be limited accordingly. The trial court acknowledged that evidence adduced at trial demonstrated that the term was often understood as limited to "Christmas tree ornament," but the court found that "the evidence failed to demonstrate that this interpretation was consistent." Having reviewed the trial record relied on by the government, we too acknowledge that evidence tended to show that consumers and industry participants often would think of "Christmas tree ornaments" when asked of "Christmas ornaments." However, the testimony of various witnesses was hardly conclusive on the meaning of "ornament" and was conditioned by such qualifiers as "probably," "in most cases," "the majority of our customer base," and "I can't give you a good definition."

Although the testimony of consumers and industry participants is probative, this court is more persuaded by the action taken by Congress itself on the issue: when Congress converted from the Tariff Schedules of the United States (TSUS) to the HTSUS, the relevant tariff provision was changed from "Christmas tree ornaments" to "Christmas ornaments." *See* item 772.95, TSUS ("Christmas tree ornaments"). The government argues that "the word 'tree' was unnecessary given the common and commercial understanding of 'Christmas Ornaments' as meaning the class or kind of ornament that is known as 'Christmas Tree Ornaments.'" We disagree. The deletion of the term "tree," we must presume, was intentional on the part of Congress. If Congress intended to retain the existing scope, as the government argues, we do not think that Congress would have substituted a relatively straight-forward term (Christmas tree ornament) with a term (Christmas ornament) that is, at least, arguably broader than the original term. *See Bentkamp v. United States*, 40 CCPA 70, 77 (1952) ("Ordinarily, where the essential word that supports a construction contended for appeared in an earlier act and has been omitted in a subsequent one by Congress, the omitted word may not be restored in the terms of the law by judicial construction. Such a change of legislative language is presumed to evidence an intent on the part of Congress to effect a change in meaning." (citation omitted)). The government's argument that the terms "Christmas tree ornament" and "Christmas ornament" are interchangeable is further undercut by the fact that "Christmas candles" and "Christmas *tree* candles" are referred to separately in the Explanatory Notes to heading 9505. *See* Explanatory Notes 95.05(B)(b). Congress thus used the term "Christmas *tree*" when it meant it, and vice versa.

The government appears to argue in the alternative that the term Christmas ornament is indeed broader and includes "hanging" orna-

ments other than Christmas tree ornaments—but is still limited only to Christmas ornaments that are *hung* from archways, doorways, ceilings, fixtures, window shades, and so forth during the Christmas season. Hence, the government argues that because the imported items at issue are not meant to be hung, they cannot be Christmas ornaments. In support of this argument, the government primarily relies on the examples in the Explanatory Notes to heading 9505, most of which hang from a tree or elsewhere. The examples in the Explanatory Notes, however, cannot control here, particularly in light of the congressional omission of the word "tree." Absent a clearer showing of congressional intent, we refuse to import incidental characteristics of the examples in the Explanatory Notes into the headings of the HTSUS. *See Marubeni Am. Corp. v. United States*, 35 F.3d 530, 535 n.3 (Fed. Cir. 1994) ("Explanatory Notes are only instructive and are not dispositive or binding.").

2

The other two requirements that the government seeks to attribute to the term "Christmas ornament"—that they be inexpensive and traditionally associated with Christmas—similarly are based on the examples found in the Explanatory Notes to heading 9505. Again, we refuse to import such extraneous limitations that are not based on the actual language of the headings. Indeed, the government's argument on this point, like its apparent assertion that Christmas ornaments at issue do not provide merriment, finds no home in reality. Ornaments of delicate glass, for example, quite common these days, are not "inexpensive," and ornaments showing the logos of favorite sports teams, for example, also quite common these days, hardly depict scenes traditionally associated with Christmas, such as those showing winter scenes, angels, presents, candy canes, and the like. In addition, we fully embrace the trial court's notion that absent legislative intent to the contrary, the term "Christmas ornament" should be construed to embrace evolving consumer tastes and not be limited to traditional Christmas themes. *See Atlas Copco N. Am., Inc. v. United States*, 837 F. Supp. 423, 426–27 (Ct. Int'l Trade 1993) ("It is conducive to the steady and predictable development of the tariff law that inventive improvements which continue to be known by a traditional name not be excluded from a class simply because of their new physical characteristics.").

C

We now turn to Midwest's cross-appeal with respect to earthenware jack-o'-lantern mugs and pitchers. The trial court held as a matter of law that when an item with a particular ornamentation (such as the jack-o'-lantern mugs and pitchers here) serves a utilitarian function and the function is served "no less efficiently than their plainer counterparts," it must be classified under the utilitarian article provision, and cannot *prima facie* be classified under the "other festive articles" provision of heading 9505. Accordingly, the mugs were classified as "mugs and other steins of ceramic tableware, kitchenware, and other household articles"

under subheading 6912.00.44, HTSUS. The pitchers were classified as "other ceramic tableware, kitchenware, and other household articles" under subheading 6912.00.48, HTSUS.

Note 2(ij) to chapter 69 states that the chapter does not cover "Articles of chapter 95." Accordingly, the issue here is whether the items at issue *prima facie* are classifiable under heading 9505. If so, then pursuant to note 2(ij), chapter 69, the items cannot fall under chapter 69 and must be classified under chapter 95. The trial court's holding that the mugs and pitchers at issue are not *prima facie* classifiable under heading 9505 was largely based on the Explanatory Notes to chapter 95. The court reasoned:

> Although the motif of the mug and plate associate them with Halloween, heading 9505 nevertheless appears ill-suited to these particular items. The examples of items coming under heading 9505 as described by the Explanatory Notes are all non-functional items: false ears, cardboard trumpets, artificial snow, etc. Explanatory Notes, 95.05(A)(1). In addition, the HTSUS provides heading 6913 as the appropriate heading for decorative tableware. The Explanatory Notes do not contemplate plaintiff's proposed classification as a possible classification for tableware, functional or decorative. *See* Explanatory Notes, 69.13(B).

Although the examples in the Explanatory Notes are probative and sometimes illuminating, we will not employ their limiting characteristics to narrow the language of the classification heading itself. Nothing from the pertinent subheading 9505.90.60—"other festive, carnival or other entertainment articles"—limits 9505.90.60 to only "non-utilitarian" items. Given that the jack-o'-lantern is a symbol so closely associated with Halloween, and that the items will be displayed and used by the consumer only during Halloween, we conclude that the mugs and pitchers at issue *prima facie* are "other festive articles" under subheading 9505.90.60. As discussed above, note 2(ij), chapter 69, excludes articles of heading 9505 from being classified under chapter 69 and obviates our need to decide whether the items also *prima facie* fall under the alternative headings 6912 ("Ceramic tableware") and 6913 ("Other ornamental ceramic articles"). *See* Note 2(ij), Chapter 69 ("This chapter does not cover: (ij) Articles of chapter 95 * * *."). Accordingly, the jack-o'-lantern mugs and pitchers must be classified as "other festive articles" under subheading 9505.90.60.

IV

For the foregoing reasons and the reasoning provided by the trial court with respect to individual items, we affirm the trial court's judgment with respect to the 25 items appealed by the government and reverse with respect to the two items cross-appealed by Midwest, as follows:

9505.10.15 Christmas ornaments of wood

(1) Nutcrackers (Santa, soldier, king, presidents, athletes and professionals)

(2) Wooden pull toy (ice skater)
(3) Toy smoker (Santa)
(18) Santa with chimney smoker

9505.10.25 Other Christmas ornaments

(4) Porcelain and fabric mâché Santa
(5) Fabric mâché Mrs. Claus
(6) Cast iron stocking hangers (Santa)
(7) Cast iron stocking hangers (Santa with lamb)
(8) Cast iron stocking hangers (Christmas elf)
(9) Cast iron stocking hangers (stacked animal)
(10) Cast iron stocking hangers (cargo car)
(16) Christmas water globe
(19) Fabric mâché Santa with bag of toys
(20) Fabric mâché Scanda Klaus
(21) Fabric mâché MacNicholas
(22) Porcelain Santa with light-up tree
(23) Resin figures (hooded Santa roly-poly)
(24) Resin figures (figures decorating tree)
(25) Resin figures (Santa in sleigh)
(26) Resin figures (Santa with tree)
(27) Resin figures (old-fashioned Santa figure)
(28) Resin figures (Santa with deer)
(29) Resin figures (Santa sewing an American flag)

9505.90.60 Other festive articles

(13) Heart-shaped metal wreath
(14) Jack-o'-lantern earthenware mug
(15) Jack-o'-lantern earthenware pitcher
(17) Easter water globe

No costs.

AFFIRMED-IN-PART AND REVERSED-IN-PART

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

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Dominick L. DiCarlo

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Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–144)

NOVELL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–02–00130

[Plaintiff's appraisement claim is severed and dismissed because the Court lacks subject matter jurisdiction.]

(Dated October 10, 1997)

George R. Tuttle, APC (George R. Tuttle, III) for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Saul Davis)* for defendant.

OPINION AND ORDER

GOLDBERG, *Judge:* This matter is before the Court on the defendant's motion to sever and dismiss plaintiff's appraisement claim for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1). Defendant argues that the Court lacks jurisdiction over this claim because the plaintiff failed to protest the reliquidation of the entries at issue, and that as a result, pursuant to 19 U.S.C. § 1514 (1994), the reliquidation became final and conclusive on all of the parties. Plaintiff counters that because part of the original liquidation was undisturbed by the reliquidation, this Court still has jurisdiction over its appraisement claim. The Court is unpersuaded by the plaintiff's analysis, and for the following reasons, grants the defendant's motion to sever and dismiss.

BACKGROUND

On January 11, 1991, the defendant, the United States Customs Service ("Customs"), initially appraised and liquidated three entries of merchandise imported by the plaintiff, Novell, Inc. ("Novell"), at a value of $2,000.00 per unit, under item 676.15 of the Tariff Schedule of the United States, at a duty rate of 3.9%. Cust. HQ Rul. 544835 at 2 (June 15, 1994).

Novell then filed a timely protest, contesting the original liquidation on two levels. First, Novell criticized how Customs appraised the mer-

chandise. Arguing that the $2,000.00 figure was erroneous, Novell advanced two alternative values that it believed were more accurate: either (a) $1,154.00 per unit, reflecting the price that the seller of the merchandise, Micro Five Corporation, paid to the manufacturer of the merchandise, Samsung Electronics; or (b) $1,350.00 per unit, reflecting the price that Novell paid Micro Five Corporation for the merchandise. Protest No. 330391–100022, Attached Text at 1. (Apr. 11, 1991). Second, Novell argued that Customs improperly found some of its imported merchandise ineligible for duty-free treatment under the Generalized System of Preferences ("GSP"), 19 U.S.C. §§ 2461–2466 (1988 & Supp. 1990). *Id.*

After reviewing the protest, Customs granted it in part, and denied it in part. Cust. HQ Rul. 544835. Specifically, Customs appraised the merchandise using Novell's second proposed alternative value, namely the price that Novell paid Micro Five Corporation for the merchandise. However, it still found that the entries were not entitled to duty-free entry under the GSP. *Id.* at 4. Customs then reliquidated the merchandise accordingly.

Importantly, after the reliquidation, Novell never filed a protest disputing how Customs reliquidated the entries. Instead, it filed suit in this Court, arguing that Customs should have appraised the merchandise using its first proposed alternative value, *i.e.*, the price that Micro Five Corporation paid Samsung Electronics for the merchandise.[1] Customs responded by filing the instant motion to sever and dismiss the appraisement claim for lack of subject matter jurisdiction.

DISCUSSION

The Court of International Trade is a court of limited subject matter jurisdiction. Before this Court may adjudicate a civil action that challenges how Customs has liquidated or reliquidated an entry, the party bringing the action must first file a protest with the Customs Service within ninety days after either the notice of the liquidation or reliquidation, or under certain circumstances, after the date of the decision that is being protested. *See* 28 U.S.C. § 1581(a) (1994); 19 U.S.C. § 1514 (1994). The Court's jurisdiction is limited to those civil actions that contest the denial, either in whole or in part, of a protest. 28 U.S.C. § 1581(a). Drawing on this provision, Novell argues that the Court has jurisdiction over the entries at issue in the protest because when Customs rejected one of Novell's alternative proposed values, Customs denied the appraisement claim in the protest "in part."

In previous cases, the court has refused to embrace Novell's interpretation of "denial in part." *See, e.g., Board of Trustees of Leland Stan-*

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[1] Although the original summons noticed the proper protest, and thereby included both the appraisement claim and the GSP claim, Novell only raised the appraisement claim in its original complaint. Compl. However, after Customs filed the instant motion to dismiss, Novell sought to amend the summons and to file an amended complaint in order to assert the GSP claim. Pl.'s Mot. to Amend Summons & to File an Am. Compl. Customs has consented to the motion, and concedes that the Court has jurisdiction over the GSP claim. Def.'s Resp. to Pl.'s Mot. to Amend Summons & to File an Am. Compl. Consequently, the Court now treats the instant motion as a motion to sever and dismiss the appraisement claim for lack of jurisdiction, and it does not further discuss the GSP claim.

for d Junior Univ. v. United States, ___ CIT ___, ___, 948 F. Supp. 1072, 1075 (1996) *("Leland Stanford"); Mitsubishi Elec. Am., Inc. v. United States*, 18 CIT 929, 931, 865 F. Supp. 877, 879 (1994); *Transflock, Inc. v. United States*, 15 CIT 248, 249, 765 F. Supp. 750, 751 (1991); *Sanyo Elec., Inc. v. United States*, 81 Cust. Ct. 114, 115, C.D. 4775 (1978). These cases establish that when Customs changes its decision "'to conform to a decision sought by a protest, that protest has been completely granted.'" *Transflock*, 15 CIT at 249, 765 F. Supp. at 751 (quoting *Sanyo Elec.*, 81 Cust. Ct. at 115). Consequently, when a party still wishes to advance its preferred alternative claim after Customs has reliquidated the entries at issue, the party should not file a civil action in this court, but should instead "advance its preferred alternative claim in a new protest against the revised decision following the reliquidation of the entry." *Sanyo Elec.*, 81 Cust. Ct. at 115.

Unsurprisingly, Novell attempts to distance itself from this line of cases. In essence, Novell seeks to construct a dichotomy between a protest that challenges how an entry is appraised, and a protest that challenges how an entry is classified.

Specifically, Novell contends that unlike a classification decision, a valuation decision consists of two related, but independent, steps. In step one, Customs chooses the statutory method it will use to appraise the merchandise, and in step two, Customs applies its chosen method to derive a final value. Pl.'s Resp. to Def.'s Mot. Dismiss for Lack of Jurisdiction at 7–9 (citing 19 U.S.C. § 1500(a) and 19 U.S.C. § 1401a). As a result, a protest may simultaneously challenge both (a) the methodology chosen by Customs, and (b) how Customs has applied it. Novell argues that in its protest, it challenged the original liquidation on both of these levels. In particular, Novell characterizes its first alternative value, the price that Micro Five Corporation paid to Samsung Electronics, as a challenge to Customs chosen methodology. Novell characterizes its second alternative value, the price that Novell paid Micro Five Corporation, as a challenge to how Customs applied its chosen methodology. *Id.* at 10.

Drawing on *Atari Caribe, Inc. v. United States*, 16 CIT 588, 799 F. Supp. 99 (1992), Novell then posits that because Customs responded to its protest by selecting the second alternative value, Customs reliquidated the entries at issue without changing the underlying methodology. As a result, according to Novell, part of the original decision survived, and the appraisement portion of the protest was denied in part. *Id.* at 12 (citing *Atari Caribe*, 16 CIT at 592, 799 F. Supp. at 104). Thus, Novell concludes that notwithstanding the classification cases, this Court has jurisdiction to review the appraisement claim under 28 U.S.C. § 1581(a). *Id.* at 5.

The Court finds Novell's characterization of both the applicable case law and the relevant statutes intriguing. Novell correctly notes that 19 U.S.C. § 1500(a) directs Customs to appraise the imported merchandise using one of the valuation methodologies outlined in 19 U.S.C. § 1401a.

Pl.'s Resp. to Def.'s Mot. Dismiss for Lack of Jurisdiction at 8; *see* 19 U.S.C. § 1500(a). Title 19 U.S.C. § 1401a, in turn, delineates those methodologies that Customs may use to appraise imported merchandise. Arranged by statute in descending hierarchal order, these methodologies are 1) the transaction value of the merchandise; 2) the transaction value of identical merchandise; 3) the transaction value of similar merchandise; 4) the deductive value of the merchandise; 5) the imputed value of the merchandise; and 6) if none of the preceding methodologies suffices, a methodology that is reasonable. *See* 19 U.S.C. § 1401a(a).

Novell is also correct that a protest could simultaneously challenge both Customs' decision to use one methodology instead of another, and how Customs has used its chosen methodology to appraise the imported merchandise. However, on the facts before it today, the Court declines to rule on whether a protest that raises both grounds has been denied in part when Customs reliquidates without changing the chosen methodology.

Instead, after reading Novell's Protest and Application for Further Review, the Court finds that Novell failed to challenge both the methodology that Customs chose, and how Customs used its chosen methodology to appraise Novell's merchandise. Rather, the Court concludes that Novell merely challenged how Customs applied its chosen methodology by offering two alternative final values which Novell calculated using the same methodology that Customs used in the original liquidation. In short, in its protest, Novell did not advance a different statutory methodology for Customs to use to appraise the imported merchandise. Consequently, the instant case closely parallels the classification cases, and this Court lacks subject matter jurisdiction.

More concretely, when Customs originally liquidated the entries at issue, Customs chose to appraise the merchandise using the transaction value methodology,[2] and, using this method, derived a value of $2,000.00 per unit. *See* Cust. HQ Rul. 544835 at 2. Significantly, in its Protest And Application For Further Review, Novell never quarreled with Customs' decision to use the transaction value method, the first methodology in the statutory hierarchy. Instead, Novell only challenged how Customs applied the transaction value methodology, arguing that Customs had erroneously determined the price of the merchandise when it was sold for exportation to the United States. Protest No. 330391–100022, Attached Text at 6, 10–24. In doing so, Novell offered two alternative prices that if felt were more accurate:

> [P]rotestant claims that the merchandise should have been appraised either at the entered value of $1,154.00 each, which represents the value of the imported merchandise as sold by the foreign seller to the U.S. order party, or at $1,350.00 each, the sales price from Micro Five to Novell.

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[2] By statute, "the transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States," plus packing costs, commissions, royalty or license fees, etc. 19 U.S.C. § 1401a(b)(1).

Id. at 1; *accord id.* at 5 (emphasis added) ("Issue: Whether the proper basis for appraisement for purposes of determining *transaction value* is the sales price per unit between the U.S. order party to the foreign manufacturer, the sales price between the protestant and the U.S. order party, or the sales price between the protestant and its customers.").

To be sure, Novell made clear that of the two proposed alternatives, it favored the one with the lowest value. Nevertheless, Novell discussed both alternatives under the rubric of transaction value. Hence, in its protest, Novell did not articulate a two prong attack against Custom's final appraisement decision; it focused only on how Customs applied the transaction value methodology.

As a result, the Court finds this situation analogous to the one presented by a protestant that challenges how Customs has classified imported merchandise by proffering two alternatives. Hence, under both the applicable case law and the facts of this case, the Court is unable to review Novell's appraisement claim because Novell failed to protest the reliquidation of the entries at issue in accordance with 19 U.S.C. § 1514. 28 U.S.C. § 1581(a); *Leland Stanford*, ____ CIT at ____, 948 F. Supp. at 1075; *Transflock*, 15 CIT at 249, 765 F. Supp. at 751.

CONCLUSION

For the foregoing reasons, the Court holds that the plaintiff's appraisement claim is severed and dismissed. So ordered.

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